United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

75-2098-2104

(42275)

United States Court of Appeals
FOR THE SECOND CIRCUIT

JAMES RHEM, ROBERT FREELY, LEO ROBINSON, and EUGENE NIXON, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

against

BENJAMIN J. MALCOLM, Commissioner of Correction for the City of New York; ARTHUR RUBIN, Warden, Manhattan House of Detention; ABRAHAM D. BEAME, Mayor, City of New York, individually and in their official capacities,

Defendants-Appellants,

PETER PREISER, Commissioner of Correction of the State of New York, HUGH CAREY, Governor, State of New York; and OWEN McGIVERN, Presiding Justice, New York State Supreme Court, Appellate Division, First Department, individually and in their official capacities,

Defendants.

(Title continued on inside cover)

B
P/S

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FILED
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A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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JAMES BENJAMIN, MIGUEL GALINDEZ, BRUCE HAYES, JOSE SALDANA and ROBERT ESCHERT, detainees of the New York City House of Detention for Men, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

against

BENJAMIN J. MALCOLM, Commissioner of Correction of the City of New York; ARTHUR RUBIN, Warden, New York City House of Detention for Men; GERARD BROWN, Deputy Warden, New York City House of Detention for Men; and ABRAHAM D. BEAME, Mayor of the City of New York, individually and in their official capacities,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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Relevant Docket Entries for Rhem.

DATE	FILINGS-PROCEEDINGS
Apr 19-73	Filed transcript of the record of proceedings std. 11/16/73.
May 28-74	Filed transcript of record of proceedings of 11-13-72
May 28-74	Filed transcript of record of proceedings of 11-14-72
May 28-74	Filed transcript of record of proceedings of 11-15-72
May 28-74	Filed transcript of record of proceedings of Jan. 16, 17, 18, 22, 23, 24, 25-1973
May 28-74	Filed transcript of record of proceedings of 1-16-73
May 28-74	Filed transcript of record of proceedings of 1-18-73
May 28-74	Filed transcript of record of proceedings of 1-22-73
May 28-74	Filed transcript of record of proceedings of 1-23-73
May 28-74	Filed transcript of record of proceedings of 1-24-73
May 28-74	Filed transcript of record of proceedings of 2-8-73
May 28-74	Filed transcript of record of proceedings of 2-26-73
May 28-74	Filed transcript of record of proceedings of 3-16-73
Jul 12-74	Filed transcript of record of proceedings, dated March 27, 1974
Jul 12-74	Filed transcript of record of proceedings, dated Jan. 18, 1974.
8- 7-74	Filed transcript of record of proceedings, dtd: July 30-74.

Relevant Docket Entries for Rhem.

DATE	FILINGS-PROCEEDINGS
11-26-74	Filed transcript of record of proceedings, dated Sept. 19-1974
Dec 12-74	Filed True copy of Order from USCA (Mandate Attached) that the order of the Dist. Court is affirmed in part and that the action be and it hereby is remanded to said Dist. Court for further proceedings in accordance with the opinion of this court. . . . It is further order, adj. and directed that the stay previously granted on 8-15-74, shall remain in effect until further action by the said Dist. Court. Fusaro, Clerk m/n
Jan 6-74	Filed transcript of record of proceedings, dated November 6, 1974
Jan 9-75	Filed Affdvt. in support of application for a writ h/c for James Benjamin. Writ Issued 1-10-75—ret. 1-10-75 9:30AM Rm. 2703.
Jan 9-75	Filed Affdvt. in support of application for a writ h/c for Rufus Hawk. Writ issued 1-10-75.
Jan 9-75	Filed Affdvt. in support of application for a writ h/c for Bruce Hayes. Writ issued 1-10-75.
Jan 9-75	Filed Affdvt. in support of application for a writ h/c for Jack Murphy, writ issued 1-10-75
Jan 9-75	Filed Affdvt. in support of application for a writ of h/c for C. Guida. Writ issued 1-10-75.
Jan 13-75	Filed Defts' Offer of Proof.
Jan 15-75	Filed Writ of H/C ad test. Re: Rufus Hawk for 1-10-75. So Ordered. Lasker, J. Writ Issued
Jan 15-75	Filed Writ of H/C ad test. Re: James Benjamin for 1-10-75. So Ordered. Lasker, J. Writ issued

Relevant Docket Entries for Rhem.

DATE	FILINGS-PROCEEDINGS
Jan 15-75	Filed Writ of H/C ad test. Re: Charles Guida for 1-10-75. So Ordered. Lasker, J. Writ Issued
Jan 15-75	Filed Writ of H/C ad test. Re: Bruce Hayes for 1-10-75. So Ordered. Lasker, J. Writ Issued
Jan 15-75	Filed Writ of H/C ad test. Re: Jack Murphy for 1-10-75 So Ordered. Lasker, J. Writ Issued (All Writs of H/C ad Test Satisfied as of 1-13-75)
Feb 20-75	Filed memorandum #41916. On 11-8-74, the Court of Appeals filed its opinion affirming our order of 7-11-74, which was based on findings of unconstitution conditions at the Manhattan House of Detention (the Tombs). The Case was remanded for consideration of the relief to be granted . . . Re: Lock-In Time; Optional Lock-In; Access Counsel outside HDM etc; Contract Visits; Visiting Schedule; Recreation; . . . We are concurrently herewith filing a judgment embodying the decisions articulated in this memorandum . . . Lasker, J. m/n
Feb 20-75	Filed Judgment . . . Ordered that defts are permanently enjoined from incarcerating any detainee who is a member of the pltff. class and is currently housed at the House of Detention for Men at Rikers Island, except under the following condition: (see Judgment) . . . Lasker, J. b/n Judgment Entered . . . 2-21-75 . . . Clerk ent. 2-21-75.
Mar 3-75	Filed Pltffs' Notice of Motion to amend and Correct judgment of 2-20-75 . . . ret . . . 3-13-75 at 10AM
Mar 3-75	Filed Pltffs' Memo of Law in support of motion to correct judgment.

Relevant Docket Entries for Rhem.

DATE	FILINGS-PROCEEDINGS
Mar 4-75	Filed Defts' Notice of Motion for an order to amend correct and stay the judg. of 2-20-75 . . . ret 3-16-75 at 10AM Rm 2704
Mar 4-75	Filed Defts' Memo of Law in support of Motion to amend, correct judg.
Mar 10-75	Filed transcript of record of proceedings, dated Jan 15, 1975
Mar 10-75	Filed transcript of record of proceedings, dated Jan 21, 1975
3-19-75	Filed Pltffs' affdvt. in opposition to deft's motion to amend the Court's Judgment 2-20-75.
3-19-75	Filed Pltffs' memo of Law in Opposition to defts' motion to amend this Court judgment of 2-20-75.
4-23-75	Filed Memorandum #42292 Pltffs. and City defts move under Rule 50(e) of the FRCP to alter our judg. of 2-20-75 . . . We are concurrently filing an amended judg. in accordance with this memorandum . . . Lasker, J. mn
4-23-75	Filed Amended Judgment . . . Re: Classification; Right to Leave Cells; Optional Lock-in Contact Visits; Visiting Schedule for Personal Visits; Recreation; Discipline; Correspondence . . . Lasker, J. mn Judgment Entered . . . 4-23-75. ent 4-28-75.
5- 5-75	Filed Pltffs' Notice of motion for an order re-opening the hearing conducted on 1-10-75 and 1-13-&30-1975 . . . ret 5-15-75 . . . 10Am.
5- 5-75	Filed Pltffs' Memo of Law in support of Pltffs' motion to reopen hearing.

Docket Entries 75—2104 (75 Civil 3073).

DATE	FILINGS-PROCEEDINGS
5- 5-75	Filed Notice of Motion for permission to proceed as Amicus Curiae by the National Prison Project.
5- 5-75	Filed Memo. of Amicus Curiae in support of pltffs' motion to reopen hearing relating to lock-in time.
5-22-75	Filed Pltff's Notice of Appeal to USCA from Amended Judg. ent 4-23-75 . . . Copies Mailed on 5-22-75 to: Bernard Richland Corp. Council Municipal bldg. NYC & L. J. Lefkowitz Atty Gen, State of NY 2 World Trade Center NYC 10047
6- 3-75	Filed Deft's Notice of Appeal

Docket Entries 75—2104 (75 Civil 3073).

6-24-75	Filed Complaint. Issued Summons.
6-26-75	Filed pltffs' affdvt. and Order to Show Cause for an order declaring this case a class action —permitting pltffs. to proceed without payment of fees—and granting a preliminary injunction. Ret. 07-01-75. Lasker, J.
6-30-75	Reassignment for JUDGE CONNOR to JUDGE LASKER.
7- 3-75	Filed Pltffs' Suppl. Affdvt. in support of its motion for Prel Inj.
7- 7-75	Filed defts affdvt in opposition to pltffs motion for a prelim. inj.
7-11-75	Filed defts memo of law.
7-14-75	Filed pltffs memo of law in support of motion for class action status & a preliminary injunction.
7-14-75	Filed Order that pltffs are granted leave to proceed without prepayment of fees or costs or security therefor . . . LASKER, J m/n

Docket Entries 75—2104 (75 Civ. 3073

DATE	FILINGS-PROCEEDINGS
7-14-75	Filed Order that defts, et al are enjoined from incarcerating any member of the pltff class at HDM except under the following condition as indicated, in (1) Contact Visits, a & b— (2) Optional Lock-in in accordance with judgment, thru d. (3) Correspondence a & b. (4) Discipline. Pltffs motion for preliminary relief re outdoor exercises & visiting schedules is denied, etc. The record in the pltffs motion for prelim relief enjoining defts re books or periodicals not sent directly from the publisher is denied. Pltffs motion to enjoin defts re waiver of pltff class is denied. This order is stayed for ten days from its filing to permit the defts to file a notice of appeal, & it is further ordered, that upon serving & filing of the appeal, this order is stayed in all respects, until the date upon which defts appeal is orally argued before the Court of Appeals . . . LASKER, J m/n
7-16-75	Filed defts notice of appeal to the USCA from order entered 7-11-75 which granted pltffs a preliminary injunction. Copy sent to: Legal Aid Society, Prisoner's Rights Project, 15 Park Row, New York, N.Y.
7-17-75	Filed summons & Marshal's return. Served: Gerard Brown. By: G. Brown 7-7-75 NYC, Hs of Det for Men, Hazen St. A. Rubin 7-7-75 Abe Beame, Mayor L. Gersten 6-25-75 Benj. J. Malcolm J. Latham 6-25-75
7-11-75	Memo Decision 42773 of July 11, 1973

Order of the Circuit Court of Appeals Affirming in Part the District Court's Order and Remanding for Further Proceedings.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of November, one thousand nine hundred and seventy-four.

Present: HON. J. EDWARD LIMBARD,
HON. WILFRED FEINBERG,
HON. JAMES L. OAKES,
Circuit Judges.

[SAME TITLE]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in part and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court.

It is further ordered, adjudged and decreed that the stay previously granted on August 15, 1974, shall remain in effect until further action by the said District Court.

A. DANIEL FUSARO,
Clerk.

By VINCENT A. CARLYN,
Chief Deputy Clerk.

Defendants' Offer of Proof.

The defendants hereby reiterate their position, stated at the conference of December 17, 1974, that this Court, in promulgating a judgment concerning conditions at institutions not heretofore examined, and effectively depriving the defendants of the opportunity to fully and completely state their defenses and prove that conditions at said institutions, singularly, and as a totality, meet constitutional standards, exceeds its authority.

It is submitted that the legality of conditions at other institutions can be tested only in the context of a plenary lawsuit with the plaintiffs having the burden of proving the lack of constitutionality of the conditions, and with the defendants a) being apprised of all charges and allegations relative to the treatment of inmates at such institutions b) being afforded the opportunity to raise all available defenses and c) being allowed to introduce all appropriate proof necessary to counter and disprove such charges.

The defendants, pursuant to the Court's direction, as set forth at the conference of December 17, 1974 make the following offer of proof. Said offer is made only at the request of this Court, over defendants' objections, and is not to be construed as an admission or recognition by the defendants of this Court's authority to promulgate orders regarding institutions other than the Manhattan House of Detention for Men.

OFFER OF PROOF:

1. *Lock out time; Optional lock in*

The lock out periods as structured at NYCHDM are essential to the proper functioning of said institution. Those periods, between 9 am and 9:30 pm in which inmates are not "locked out", are taken up with such tasks as inmate feeding (at which time inmates are taken to dayrooms and are out of their cells, though not technically in "lock out

status), tier sanitation, head counts, and correction officer shift rotation. The defendants can show, through the introduction of expert testimony, that the lock out periods, as presently structured, are necessary for the proper administration of the cell blocks and must be retained regardless of the security classification of inmates. Moreover, while the defendants can show that the present lock out practices when viewed independently, provide inmates with ample movement and freedom consistent with their detainee status, said practices, when combined with the multiplicity of recreational programs and activities available at the institutions establish a pattern of activity and movement far superior to the freedom and movement afforded at the vast majority of detention institutions in the nation.

The Court is especially referred to the matters of *Valvano* v. *Malcolm,* —— Civ. ——, and the matter of the *Detainees of the Brooklyn House of Detention for Men* —— Civ. ——, in which Judge Judd, after viewing the administrative requirements of the Brooklyn and Queens Houses of Detention for Man, and after examining the possibilities of inmate classification, sustained the lock out practice as structured in said institutions (where the lock out hours are almost identical to those at NYCMHD) and which are applied to all inmates at said institutions, regardless of security classification.

With respect to optional lock out, it will be shown how the optional lock out program, as presently structured, strikes a balance between the interests of affording inmates maximum amounts of freedom and proper institutional administration. Furthermore, it will be shown that the optional lock out schedule at NYCHDM is more liberal than afforded at most detention centers, with further reference to the matters of *Valvano* v. *Malcolm, supra,* and *Detainees of the Brooklyn House of Detention for Men, supra.*

2. *Classification and Contact Visits*

It will be shown that classification is presently performed at City institutions. Pursuant to General Order No. 33, the Department of Correction separates and classifies inmates falling into the following categories: Inmates under Mental Observation, Medical Observation, Drug Detoxification, Escape Risks, Suicide Risks, Inmates in need of Protective Custody, Homosexuals, Inmates presenting threats to the good order, discipline or security of the institution.

Further classification would be of limited usefulness. Evidence will be introduced to show that detention centers are not supplied with information to the extent available to officials at sentence facilities. Moreover, a large percentage of inmates are not confined in City institutions for periods of time sufficient to enable correction personnel to perform classification on a basis comparable to sentence institutions.

And, as stated earlier, to the extent that further classification is possible, it can be shown that such additional classification will be of limited application. For, the classification made pursuant to the aforementioned General Order No. 33 already separates inmates deemed unsuitable for participation in selected institutional programs. Furthermore, defendants will prove that the lock out schedule as structured is needed regardless of the security classification of the inmates (consistent with the findings of Judge Judd in the *Valvano* and *Detainees of the Brooklyn House of Detention* cases).

While it has not been determined whether a classification system will be needed to implement contact visits, it will be shown that for a variety of reasons, contact visits, in the context of NYCHDM, will not take on the importance the District Court attached to this feature upon its review of conditions at the Manhattan House of Detention for Men. First, it will be shown that the increased schedule

of regular visits at NYCHDM take place in an orderly atmosphere in which inmates have no trouble communicating with their visitors. Physical apparatus in the booths enable the visitor to have an optimum degree of visual communication. It will be shown that said factors, combined with the totality of conditions at said institution, negated any ostensible psychological harm resulting from the lack of such visits.

The defendants will also show that the vast majority of detention centers throughout the nation have visitation schedules far more restrictive than the schedule now in force at NYCHDM and that visiting procedures in effect at NYCHDM offer greater frequencies and availability of visits to a broader scope of people (relatives, friends, small children are all eligible) than available in most other detention institutions.

The defendants will also demonstrate that the above factors reduce contact visits to marginal significance, not outweighed by the practical difficulties attendant in their implementation.

3. *Visitation Schedule*

Defendants will demonstrate that the visitation schedule presently in effect at the NYCHDM affords the inmates visits that both qualitatively and quantitatively exceed visits afforded inmates at the vast majority of detention centers. Said schedule allows the inmates four regular visits per week of one-half hour duration. In addition, inmates will be afforded children's visits on Monday night as well as visits on alternate Sundays.

Defendants will demonstrate that this schedule provides the inmate with significant amounts of outside contact at a level of frequency that limits the importance of contact visits. Moreover, it will be demonstrated that inmates in City institutions receive, on the average, far greater numbers of visits than inmates in State sentence facilities.

4. *Telephones*

Defendants submit that this was not a feature litigated in the *Rhem* v. *Malcolm* lawsuit. Defendant submits that the installation of telephones is not a constitutional requirement at detention institutions particularly in view of the ready access to counsel and visitors at said institutions. Defendants will show that such a feature has not been provided to the vast majority of detention institutions in the nation. In any event, telephones are presently being provided to the NYCHDM housing blocks for inmate use. Said facility thus affords the inmates a feature of incarceration in excess of that which is constitutionally mandated.

5. *Recreation*

The recreation program at NYCHDM clearly affords inmates an amount of recreation exceeding constitutional requirements. The recreational program at NYCHDM is divided into warm weather and cold weather phases. During warm weather months, inmates utilize the outdoor recreation yards for periods in excess of one hour, Four times per week. During the cold weather months, inmates utilize the gymnasium once per week and will be able to utilize the outdoor yards twice per week. (Such yard periods are given, of course, weather permitting) Additional construction presently under way will enable the institution to afford increased amounts of gymnasium time. This basic recreational program is supplemented by an increasing number of educational, cultural and recreational programs established both by the institution and outside voluntary groups. In addition, inmates are shown weekly movies, and afforded such special events as shows and concerts. Defendants will prove that such recreational programs far exceed those programs offered in the vast majority of detention centers. Moreover, it will be demonstrated that said programs provide sufficient opportunities

for physical exercise. Similarly, it will be shown that in addition to the above mentioned organized programs, inmates exercise in the lock out areas, dayrooms and cells.

6. *Correspondence*

The defendants will prove that the inmates at NYCHDM have available substantial amounts of reading material. The books and periodicals contained in the institutional library are readily available to all inmates upon request. In addition, each block is equipped with mini-libraries whose books are constantly rotated. It will be shown that the availability and quality of such resources permits the institutions to impose, for reasons of security, limitations on the inmates rights to receive such material from certain outside sources.

Dated: December 20, 1974.

ADRIAN P. BURKE
by DONALD J. TOLERA
Assistant Corp. Counsel

R H E M

Memorandum of District Court.

LASKER, D.J.

On November 8, 1974, the Court of Appeals filed its opinion affirming our order of July 11, 1974 which was based on findings of unconstitutional conditions at the Manhattan House of Detention (the Tombs). The case was remanded for consideration of the relief to be granted.

I.

On November 15, 1974, the Commissioner of Correction advised this court that the City had decided not to remedy the unconstitutional conditions at the Tombs, but rather to close the institution and transfer its remaining 350-400 inmates to the House of Detention for Men at Rikers Island. The plaintiffs do not dispute the City's right to close the Tombs (its use was actually discontinued on December 20, 1974). They claim, however, that except for matters inextricably related to the physical structure of the Tombs (such as the effect of excessive noise, heat and lack of ventilation, issues the plaintiffs now abandon) they are entitled to the same relief at the Rikers Island House of Detention for Men (HDM), where they are now held, as they would have been had they remained in custody at the Tombs.

The City, on the other hand, takes the position that the decision of the Court of Appeals is limited in its effect to

conditions at the Tombs, and that therefore this court has no power to grant relief to the plaintiffs now housed at HDM. This is an oversimplification of the case.

In the opinion on which the order appealed from was based, we not only made findings of fact as to conditions at the Tombs, but determined the constitutional standards of protection to which detainees were entitled. These constitutional standards were specifically affirmed by the Court of Appeals which stated:

> "The demands of equal protection of the law and of due process prohibit depriving pre-trial detainees of the rights of other citizens to a greater extent than necessary to assure appearance at trial and the security of the jail; and the same constitutional provisions prevent unjustifiable confinement of detainees under worse conditions than convicted prisoners." —— F.2d —— referring to 371 F.Supp. at 623.

These remain the standards by which the validity of plaintiffs' claims—which now refer to conditions at HDM—are to be judged

Moreover, the Court of Appeals affirmed our findings that:

1. A system of classification could be feasibly established

which would identify the distinct minority of detainees who needed to be held in maximum security.

2. After the establishment of a classification system the needs of institute security could be met without locking the large majority of detainees in their cells 16 hours a day.

3. The large majority of detainees who need not be held in maximum security are entitled to "contact visits" rather than being required to communicate with their visitors by telephone in glass windowed booths.

4. Visiting rights generally are unnecessarily limited and are far less than those accorded convicted felons.

5. A 50-minute per week opportunity for exercise is inadequate. ——F.2d —— and ——.[1]

The plaintiffs continue to press for relief as to the establishment of a classification system limitation of lock-in, optional lock-out, adequate physical recreation, contact visits and other visiting conditions, disciplinary procedures and regulation of correspondence. In the earlier stages of this litigation (371 F.Supp. 594) the plaintiffs had prevailed on every one of these subjects. None of them is a matter inextricably related to the physical conditions at the Tombs.

Memorandum of District Court.

To determine the facts at HDM relating to the items on which plaintiffs continue to ask relief, the court visited HDM (and associated Rikers Island facilities) in the company of counsel, the Commissioner of Correction, the Warden of HDM and several members of the plaintiff class,[2] and heard the testimony of witnesses on January 10th, 13th and 30th.[3]

The City argues that plaintiffs' claims for relief at HDM can only be pressed in a new lawsuit replete with full discovery and a trial de novo. For a number of reasons we emphatically disagree. First, the subject of the pending litigation is, as it has always been through its tortuous history, the rights to which plaintiff detainees are entitled under the Constitution. Second, the hearings held January 10th, 13th and 30th as to conditions at HDM, supplemented by visits to HDM and the testimony in the prior record of experts on the remaining issues of classification, lock-in, visitation, etc., constitute the equivalent of a plenary trial. Third, no showing has been made—or offered—which demonstrates the need for further discovery. Indeed the facts as to conditions at HDM are obviously fully known to the City defendants who are the very administrators of HDM. Finally, the Court of Appeals has specifically instructed in its opinion,

that although the parties should have a further opportunity promptly to offer suggestions as to a final order here, ". . . the district judge should not allow another trial on the merits of plaintiffs' claim or countenance any significant delay in fashioning another decree. Four years after ugly riots caused by conditions at the Tombs, the time has come to end this litigation". While it is true that the Court of Appeals may not have contemplated that the City would close the Tombs, its instructions are applicable with equal force to the situation as it stands. To paraphrase *Katz* v. *United States*, "[The Constitution] protects people not places". 389 U.S. at 351 (1967).

Nor is there merit to the City's argument that plaintiffs' remaining claims have been mooted by their transfer to HDM. The claims as to conditions inextricably relating solely to the physical arrangement at the Tombs—such as excessive noise and heat, lack of ventilation, etc. have been abandoned. As to the remaining issues, plaintiffs contend that they continue to be held under unnecessarily restrictive conditions at HDM—just as they were at the Tombs—and the persistence of the issue undercuts the claim of mootness. The cases on which defendants rely are not to the contrary. They merely articulate the indisputable proposition that when a prisoner is transferred to a second

prison at which the conditions of which he complained at the first no longer exist, his complaint is mooted.

We proceed to the merits.

II.

Classification:

The Court of Appeals affirmed the finding at 371 F.Supp. 624-5 that the institution of a classification system at the Tombs was feasible and needed "to determine those who do and do not require maximum security custody." There is no evidence of record, nor any reason to believe that the institution of a classification system at HDM is any less feasible. The need for classification of detainees at HDM relates to the issues of lock-in and contact visits.

The City contends that there are only two reasons for the extended daytime lock-in hours at HDM, neither of which supports the need to establish a classification system: first, the necessity of head counts of detainees; second, the requirement of cleaning the jail. Plaintiffs do not dispute either that these functions are necessary or that they are not the sole reasons for daytime lock-in at HDM. They contend, however, that the number and duration of head counts is excessive and that the cleaning periods can be substantially shortened by using more detainees to do the job and by providing inexpensive additional cleaning equipment.

We discuss below whether the period of lock-in can be shortened by the devices plaintiffs suggest, but we agree with the City that, in any event, head counts and housecleaning are clearly required in the administration of HDM, and the question whether the periods devoted to them can be shortened, to permit a diminution of lock-in is unrelated to the classification of detainees.

The right to contact visits raises other considerations. The earlier decision in this case held that "a system of contact visiting be introduced—at least for all detainees who, by classification, are shown not to require maximum security custody." (371 F.Supp. at 626) The City has acquiesced in this requirement; but has not indicated whether it proposes to allow contact visits to *all* detainees. In the event that the City's plan does not provide all detainees the right to contact visits, the limitation of the right must be justified by a system of classification which will exclude only those inmates shown to require maximum security.

Lock-in Time

Plaintiffs contend that lock-in time can, and should be, considerably lessened by reducing the number of head

counts and shortening the periods of cleanup by use of more men and equipment. Seven headcounts are taken daily at HDM. This is the same number taken at the Federal House of Detention in Manhattan,[4] and we find the number reasonable and necessary for the security of the institution. There is evidence that the duration of head counts and cleanup periods might be shortened, particularly in the case of cleanups. Yet it would be inappropriate for the court to define a specific duration for either activity. What is clear is that the City has an obligation to complete these functions within reasonable periods of time, so that detainees—who are entitled to be held under the least restrictive conditions necessary for the institution's security—are not locked in their cells for periods longer than actually required, or as a pretext for the unjustified imposition of maximum security.

Optional Lock-in:

As its name suggests, the phrase "optional lock-in" refers to a system under which a detainee has the choice of remaining in his cell in lock-out periods. At 371 F.Supp. 628 it was held that while experiment might be necessary before final establishment of such a program, the City should provide a plan for optional lock-in "to assure, as

the least restrictive alternative that detainees are accorded, where possible, the 'right to be left alone' ".

The City recognizes the value of optional lock-in and, to the credit of the HDM administrators, optional lock-in is permitted during the periods from the end of the evening meal, about 6:30 P.M., until 9:30 P.M., daily and 8:00 A.M. to 4:00 P.M. on Saturdays and Sundays.

The sole objection which the City posits to extending optional lock-in hours is that doing so will cause administrative difficulty. The City claims in particular that processing of visits will be significantly impeded if it becomes necessary for a correction officer to locate a detainee in his cell, should the detainee receive a visit during a period of optional lock-in. With due respect to the good judgment and sense of fairness with which the testimony of HDM's warden was imbued on other subjects, we find this argument unpersuasive and unsupported by the facts of record.

The dispute as to further optional lock-in relates solely to the hours during which "activities" occur; that is, the times when men on a particular cell block have the choice of attending various activities including library use, commissary visits, physical recreation, etc. At the beginning

of that period, a detainee who engages in an activity proceeds to its location; those who do not are locked *out* of their cells, and must remain within the cell block on the floor or tiers outside the cells or in the block's dayroom. Those who would prefer to remain in—or return to—their cells for reading, writing or simply to be alone, are not permitted to do so.

We find nothing in the record to establish that should a detainee receive a visitor during an activity period, it would impede the processing of visits to any greater degree for a correctional officer to find the inmate in his cell than if the man were to be located in the public parts of the cell block or at a designated activity. While it is the prerogative of the administrator to determine how an optional lock-in should be implemented, there seems to be no dispute that whatever problem there might be in locating detainees for visits can be obviated by the simple device of requiring an inmate choosing lock-in to indicate the choice at the commencement of the activity period. He will, of course, thereby waive his right to attend an activity for that period, or to remain in the public parts of the cell block. However, his whereabouts will be as effectively known to the responsible correction officer as if he were

at an activity or in the public sections of the cell block. The judgment below, therefore, orders the establishment of further optional lock-in on the conditions specified.

Access to Counsel Outside HDM, Telephone and Overnight Housing in New York County:

Plaintiffs' proposed judgment contains provisions (1) granting them the right to continue to meet counsel and receive personal visits in New York County (HDM is at the eastern extreme of Bronx County, adjacent to but separated by water from Queens County); (2) requiring the City to provide free daily access to telephones and (3) requiring the City to provide overnight housing in New York County for Plaintiffs who are to consult their attorneys or appear in court the following day.

It is understandable that plaintiffs pray for this relief, since through no fault of their own they have been transferred to HDM from the Tombs, located in New York County, where they enjoyed the right to daily telephone use, where access to counsel and visitors was significantly easier, and where they will face trial. Yet the relief is plainly beyond the power of this court to grant if for no other reason that that the subject matter has never formed a part of this suit. To its credit, the City, which volun-

tarily initiated a telephone program at the Tombs, is making every effort to provide the same services at HDM, although its island location presents mechanical problems which unavoidably slow the completion of the program.[5]

Contact Visits:

The City offered no evidence that contact visits, ordered at the Tombs, are not feasible at HDM. Indeed, it now agrees to establish a program for contact visits.

Visiting Schedule:

The earlier decision held (371 F. Supp. at 628) that plaintiffs were entitled to liberalization of visiting days and hours at the Tombs. Plaintiffs claim that HDM's visiting schedule, as was that of the Tombs, is inadequate. The validity of visiting schedules must be judged by balancing a detainee's right to a reasonable number of visits from his family and friends against the limitation of possibilities inherent in the location and accessibility (or inaccessibility) of the institution.

A substantial part of the testimony at the hearings relating to HDM dealt with these problems. Special difficulties in providing visits at HDM are caused by its location on Rikers Island, which is not only relatively inaccessible

—a single causeway is the sole approach and only one bus line carries passengers to the Island—but which is also the location of the Women's House of Detention, Adolescent Detention Center Adolescent Remand Shelter and the City Penitentiary for convicted prisoners. The total inmate population of Rikers Island is approximately 6,000, including the 1500 detainees at HDM.

To its credit, and recognizing its responsibility for having transferred the Tombs inmates to HDM, the City has noticeably improved the visiting schedule at HDM from what it was at the outset of the renewal of this litigation. The present schedule allows the following visits:

Monday	Children's Visits 4:00 P.M. to 6:00 P.M. (Adults may *not* visit on Monday unless accompanying the child of an inmate)
Tuesday	10:00 A.M. to 1:00 P.M.
Wednesday	10:00 A.M. to 1:00 P.M.
Thursday	10:00 A.M. to 1:00 P.M.
Saturday	11:00 A.M. to 2:00 P.M.*
Sunday	11:00 A.M. to 2:00 P.M.*

* Inmates are allowed visits on Saturday one week and Sunday the next week on an alternating basis.

Plaintiffs argue they are entitled to a still more liberalized schedule, both because even the old schedule at the

Tombs allowed visits in greater number and length, and because the very remoteness of the institution—requiring visitors to spend most of the day coming to and going from Rikers Island, and thereby limiting the possible number of visits—justifies, if it does not compel, the grant of a visit of two hours duration.

As appealing as these arguments are, they do not carry the day. It is clear from the record that to expand the visiting schedule would, because of limitations of time and facilities at Rikers Island, result either in lessening the time or number of visits which inmates of other Rikers Island institutions enjoy, or of reducing the number of inmates at HDM itself who could receive visits at any given time.

It must be remembered that we are here dealing with constitutional rights which set minimal, not maximum or "desirable" standards. The constitutional norm ought to be a reasonable number of opportunities for visits of reasonable duration.

We cannot say that, in the circumstances, however desirable it may be that visits should be more frequent or longer, the present 30 minute period is *constitutionally inadequate,* so long as it provides, as it now does, at least a weekly opportunity for the inmate to receive a visit

from his wife or some family member. Because so many of the wives of inmates either work during the day or are occupied as mothers at night, or both, the visting schedule ought to assure a detainee of a weekly visit from his wife. The schedule has now been amended to assure that right by providing that every detainee is entitled to one visit either at night on Monday through Friday or during the day on Saturday or Sunday each week. Plaintiffs are entitled to the guarantee of that right.

In the earlier decision, it was held (371 F.Supp. at 625) that without reasons being shown to the contrary, plaintffs, then inmates at the Tombs, were entitled under the equal protection clause, to a visting schedule no less liberal than the schedule for convicted prisoners in State institutions. Moreover, the actual visiting schedule at the Tombs at the time plaintiffs were transferred to HDM was at least in some ways more extensive than HDM's present schedule. Plaintiffs contend that their visitation rights at HDM should be at least as generous as those which they enjoyed at the Tombs and which State prisoners are granted. The argument would prevail if conditions at HDM did not differ as markedly as they do both from State institutions and the Tombs. We have said enough above about the problems caused by HDM's inaccessibility

and the necessity to process visitors at adjacent institutions to indicate why the State and former Tombs schedules are not, as the State schedule was in the earlier stages of the litigation, standards which can be automatically followed at HDM.

Recreation:

The earlier decision (371 F.Supp. at 627) found that the 50 minute per week opportunity for exercise at the Tombs did not meet constitutional standards. At HDM, for a number of reasons including the fact that the gymnasium is shared with inmates of the Adolescent Detention Center, the exercise period from October through May is also 50 minutes per week, and accordingly does not meet constitutional standards.

Both indoor and outdoor exercise facilities exist at HDM. Their enlargement is, of course, the only solution to the problem. The City has embarked on expansion of indoor facilities by commencing the construction of a separate gym to be used by adolescents. When this project is completed it will approximately double the gym time available to HDM inmates. However, the target date for completion of the new facilities is 1977, and experience has shown that City construction projects are susceptible to even greater delay than is normally to be expected for private buildings.

Accordingly, the new gym can be of no value to the present detainees who, even in extreme cases, will no longer be inmates at HDM when it is completed.

The outdoor facilities consist of five recreation yards in the areas between the cell blocks. These are used daily between late May and mid-October, but not otherwise. Plaintiffs urge that they be allowed to exercise in these yards during the rest of the year (October-May). Clearly they are entitled to such use of these yards to bring their opportunity for physical exercise up to constitutional standards. We have set forth in detail at (371 F.Supp. at 611-12 and 626-7) the testimony of experts at the original trial in this case that detainees ought to be afforded a minimum of one hour of exercise daily. Their opinions, and our findings, apply with equal force whether the jail in question is the Tombs or HDM.

The City's sole objection to the winter use of recreation yards is that it will require the employment of further manpower at additional cost. No one, least of all a public official, can fail to recognize the seriousness of imposing additional financial burdens on the City at a time when it is critically short of funds. Nevertheless, as we stated at 371 F. Supp. 626, quoting Justice (then Judge) Blackmun,

"constitutional requirements are not, . . . to be measured or limited by dollar considerations . . ." *Jackson* v. *Bishop,* 404 F.2d 571-580 (8th Cir. 1968). This is especially true when the expenditure involved is a limited one as to cost.[6] Accordingly, the judgment will provide for the week-day use of the recreation yards during the winter period (October-May). This expansion of the recreational program will bring it within the ambit of constitutional standards. We do not require the use of the recreation yards on Saturdays and Sundays since the correctional manpower on hand at HDM and at the Central Security Facilities of Rikers Island on those days is seriously depleted. The benefit to the plaintiffs of the marginally additional exercise which the use of the recreation yards on those two days would afford is outweighed by the major expenditure which would be imposed on the City, an expenditure which would be unwarranted even in light of the rule set forth in *Jackson* v. *Bishop, supra.*

We are concurrently herewith filing a judgment embodying the decisions articulated in this memorandum.

Dated: New York, New York
February 20, 1975.

MORRIS E. LASKER
U.S.D.J.

Memorandum of District Court.

FOOTNOTES

1. The court concluded: "In short, after a review of the record and the applicable law, there is no doubt at all in our mind that [the trial judge's] findings of fact and conclusions of law in his detailed opinion in January 1974 [371 F.Supp. 594] must be affirmed.

2. The court had also visited HDM in August 1974 in connection with separate pending litigation.

3. The transcript of hearings is 431 pages in length.

4. Testimony of Louis Gengler, Warden of the Federal Detention Center, in *Valvano* v. *Malcolm*, 70 Civ. 1390 (E.D.N.Y. 1970) at p. 52A. Gengler's testimony related to conditions as of January, 1974.

5. The Special Committee on Penal and Correctional Reform for the New York County Lawyers' Association wrote to Mayor Beame on December 6, 1974 to inform him of the Committee's unanimous belief that the Tombs be used for men on trial and, if possible, for prisoners whose actual presence is required in court. The Community Service Society of New York wrote to the Mayor on December 13, 1974 to voice the same request.

6. At the hearings of January 30th, Warden Thomas of HDM testified that the institution would require four additional correctional officers each day for at least six hours to administer winter use of the recreational yards. Assuming that such men would be appointed to full time positions and that their salaries would average $13,500. per year (see Schedule annexed to Memorandum of Commissioner of Correction, November 27, 1974, to Director, Bureau of the Budget, attached to papers in support of plaintiffs' motion for an order providing that the inmate staff ratio at HDM be preserved, returnable January 15, 1975) the increased cost would be $54,000. plus fringe benefits.

Judgment of District Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3962
JUDGMENT

JAMES RHEM, ROBERT FREELY, LEO ROBINSON and EUGENE NIXON, individually and on behalf of all other persons similarly situated,

Plaintiffs,

—against –

BENJAMIN J. MALCOLM, Commissioner of Correction for the City of New York; ARTHUR RUBIN, Warden, Manhattan House of Detention for Men; ABRAHAM D. BEAME, Mayor, City of New York; PETER PREISER, Commissioner of Correction of the State of New York, HUGH CAREY, Governor, State of New York; and OWEN MCGIVERN, Presiding Justice, New York State Supreme Court, Appellate Division, First Department, individually and in their official capacities,

Defendants.

This action having been tried by this court, Honorable Morris E. Lasker presiding, and the court having made and filed findings of fact and conclusions of law dated January 7, 1974, and having filed an order July 11, 1974; and the Court of Appeals by decision dated November 8, 1974 having affirmed this court's findings of fact and conclusions of law as to the unconstitutionality of conditions at the Manhattan House of Detention for Men (the Tombs), and having remanded for further consideration of the remedy to be provided; and the City defendants having terminated the use of the Manhattan House of Detention for the custody of any members of the plaintiff class and

having transferred to the House of Detention for Men at Rikers Island, members of the plaintiff class who were, up to the time of transfer, in custody at the Manhattan House of Detention; and

Plaintiffs having presented a proposed judgment intended to insure that inmates transferred from the Manhattan House of Detention for Men are afforded treatment at the House of Detention for Men on Rikers Island consistent with the findings set forth in the court's opinion of January 7, 1974; and

The court having visited the House of Detention for Men on Rikers Island in the company of the parties and counsel and having heard testimony and taken evidence on the 10th, 13th and 30th days of January, 1975, to determine the applicability of the court's prior rulings regarding the issues of contact visits, visiting schedules, inmate classification, lock-out time and optional lock-in, to the House of Detention for Men at Rikers Island, and having considered the evidence presented and upon all the pleadings had herein, it is hereby

ORDERED, ADJUDGED and DECREED that defendants, their agents and employees and all persons acting in concert with them be and hereby are permanently enjoined from incarcerating any detainee who is a member of the plaintiff class and is currently housed at the House of Detention for Men at Rikers Island, except under the following conditions:

1. Classification

Within ninety days of the entry of this judgment, defendants shall establish a classification system for purposes of implementing paragraphs 2(b) and 4(b) below.

2. Right to Leave Cells

(a) Within sixty days of the entry of this judgment, defendants shall permit plaintiffs to leave their cells at all

times except for such reasonable periods as may be necessary for defendants to conduct counts of the population and to clean the institution.

(b) Defendants, upon establishing the classification system referred to in Paragraph 1 of this judgment, may apply to the court for permission to impose a more restrictive lock-in schedule upon selected detainees in instances where defendants can establish, based upon said classification system, that implementation of subparagraph (a) of this paragraph would jeopardize institutional security.

3. Optional Lock-in

(a) Within sixty days of the date of entry of this judgment, defendants shall commence a program of optional lock-in during activity periods in two cell blocks chosen by the Warden of the House of Detention for Men at Rikers Island. Inmates in such cell blocks choosing to remain locked in their cells during activity periods shall have the option to do so.

(b) In the event that upon the expiration of thirty days after the commencement of such expanded optional lock-in the Warden of the House of Detention for Men at Rikers Island determines that it is not practical or feasible to extend such optional lock-in to all the members of the plaintiff class, he shall report to the court in writing his reasons for such a conclusion, furnishing a copy of such report to the attorneys for the plaintiffs. Within ten days thereafter counsel for the plaintiffs shall respond in writing to the court furnishing a copy of their response to attorneys for the defendants. Thereafter, the court will determine whether the program of expanded optional lock-in shall be eliminated, further tested or applied to all members of the class within the institution.

(c) Unless the Warden of the House of Detention for Men at Rikers Island shall timely furnish the court with the report referred to in the previous paragraph, then upon the expiration of the sixtieth day after the commencement of such expanded optional lock-in, all members of the plaintiff class shall be entitled to and receive such expanded optional lock-in.

4. Contact Visits

(a) Within ninety days of the entry of this judgment all personal visits accorded plaintiffs shall be contact visits.

(b) Defendants, upon establishing the classification system referred to in Paragraph 1 of this order, may apply to the court for permission to deny contact visits to selected detainees in instances where defendants can establish, based upon said classification system, that contact visits would jeopardize institutional security.

5. Visiting Schedule for Personal Visits

(a) The visiting schedule for personal visits shall be arranged to assure each member of the plaintiff class a minimum of one weekly visit at night or on a Saturday or Sunday. Every visit shall last a minimum of one-half hour and shall not then be terminated unless the visiting facilities are filled to capacity and additional visitors are waiting, in which case those visits which have lasted the longest in excess of the minimum shall be terminated first.

(b) The present number of visits per week shall not be reduced.

6. Recreation

Defendant shall forthwith take all steps necessary to employ such additional correctional personnel as is nec-

essary to afford every detainee a period of one hour outdoor exercise, Mondays through Fridays inclusive, except in inclement weather. Defendants shall permit detainees to possess warm outer garments and shall provide warm outer garments to indigent detainees to facilitate outdoor recreation in cold weather.

7. Discipline

The provisions of Paragraphs 4 and 5 and Schedule A of this court's judgment of March 22, 1974 shall be observed by defendants in respect to all members of the plaintiff class except to the extent stayed by this court's order of July 31, 1974.

8. Correspondence

The provisions of Paragraphs 1-3 of this court's judgment of March 22, 1974 shall be observed by defendants in respect to all members of the plaintiff class.

Dated: New York, New York

February 20, 1975.

MORRIS E. LASKER

U.S.D.J.

Plaintiffs' Notice of Motion to
amend and correct Judgment of 2-20-75

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3962
NOTICE OF MOTION TO AMEND AND CORRECT JUDGMENT

JAMES RHEM, et al.,

Plaintiffs,

—against—

BENJAMIN J. MALCOLM, et al.,

Defendants.

PLEASE TAKE NOTICE that upon the annexed affidavit of Joel Berger, Esq., and all prior proceedings had herein, the undersigned will move this Court on the 13th day of March, 1975, at the United States Courthouse, Foley Square, New York, New York, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order pursuant to Rules 59(e) and 60(a) of the Federal Rules of Civil Procedure amending and correcting this Court's judgment of February 20, 1975 with regard to the issues of numbers of visitors per visit, visiting schedules and recreation, and granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
March 3, 1975

Yours, etc.,
JOEL BERGER
WILLIAM E. HELLERSTEIN
JOEL BERGER
STEVEN A. HERMAN
The Legal Aid Society
Prisoners' Rights Project
15 Park Row
New York, New York 10038
[212] 374-1737

Plaintiffs' Notice of Motion.

To: Hon. W. Bernard Richland, Esq.
Corporation Counsel
Municipal Building
New York, New York 10007
Attention: Donald J. Tobias, Esq.

Hon. Louis J. Lefkowitz, Esq.
Attorney General
Litigation Bureau
47th Floor
World Trade Center 2
New York, New York 10047
Attention: David Berman, Esq.

Affidavit of Joel Berger in Support of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3962
AFFIDAVIT

JAMES RHEM, et al.,

Plaintiffs,

—against—

BENJAMIN J. MALCOLM, et al.,

Defendants.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JOEL BERGER, being first duly sworn, deposes and says:

1. I am Assistant Attorney-in-Charge of the Legal Aid Society Prisoners' Rights Project, and am one of the attorneys for plaintiffs in the above-titled case.

2. I submit this affidavit in support of plaintiffs' motion pursuant to Rules 59(e) and 60(a) of the Federal Rules of Civil Procedure to amend and correct this Court's judgment of February 20, 1975.

3. Plaintiffs' motion is based entirely upon the decision of the Court of Appeals and this Court's findings of fact and conclusions of law in the instant case. Accordingly, there is no need to recite facts anew in affidavit form, and the main arguments in support of plaintiffs' motion are contained in the Memorandum of Law accompanying this motion.

4. Briefly stated, plaintiffs' motion is addressed to four provisions of this Court's judgment of February 20, 1975:

a) The Court did not enter relief enforcing plaintiffs' right to receive more than one visitor per visit, an issue previously decided in plaintiffs' favor by this Court.

b) The visiting schedule accepted by the Court does not meet minimal constitutional standards under the terms of the Court's original opinion, as affirmed by the Court of Appeals. To the extent that the presence of other jails on Rikers Island renders implementation of constitutionally required standards difficult at HDM, the proper course is not to countenance HDM's schedule but rather to give defendants sufficient time to expand visiting in a manner which will accord all detainees on the Island constitutionally adequate visiting rights.

c) On the issue of recreation, the Court applied a constitutionally impermissible test when it denied weekend recreation periods by balancing defendants' financial resources against plaintiffs' need for said exercise. Plaintiffs believe that one hour of exercise daily is the minimum standard established by the record of this case, a standard which may not be curtailed on the basis of financial considerations.

d) The Court should have set a specific implementation deadline on the issue of recreation, to insure that defendants will make diligent efforts to comply therewith.

5. The specific language proposed by plaintiffs for amendment and correction of the judgment on each of the above issues is contained at the conclusion of the discussion of each issue in plaintiffs' Memorandum of Law.

WHEREFORE it is respectfully requested that this Court grant plaintiffs' motion by amending and correcting the

judgment as indicated, and grant such other and further relief as this Court deems just and proper.

JOEL BERGER

Sworn to before me this
3rd day of March, 1975

STEVEN ALAN HERMAN
Notory Public

STEVEN ALAN HERMAN
Notary Public, State of New York
No. 31-4502895
Qualified in New York County
Commission Expires March 30, 1975

Defendant's Notice of Motion to Amend
Correct and Stay Judgment of 2-20-75.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3962
NOTICE OF MOTION

Judge Lasker

JAMES RHEM, ROBERT FREELY, LEO ROBINSON and EUGENE NIXON, individually and on behalf of all other persons similarly situated,

Plaintiffs,

—against—

BENJAMIN J. MALCOLM, Commissioner of Correction for the City of New York; ARTHUR RUBIN, Warden, Manhattan House of Detention for Men; ABRAHAM D. BEAME, Mayor, City of New York; PETER PREISER, Commissioner of Correction of the State of New York; HUGH CAREY, Governor, State of New York; and OWEN MCGIVERN, Presiding Justice, New York State Supreme Court, Appellate Division, First Department, individually and in their original capacities,

Defendants.

PLEASE TAKE NOTICE that upon the annexed affidavit, the defendants will move this Court at a regular session thereof to be held in Room 2704, of the United States District Courthouse, Foley Square, New York, New York, on the 16th day of March, 1975 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order pursuant to Rules 59(e) and 62(b) of the Federal Rules of Civil Procedure, to amend, correct and stay the judgment of the Court dated February 20, 1975.

Dated: New York, New York
March 3, 1975

W. Bernard Richland
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, N. Y.
566-2188/3927

To: William Hellerstein
15 Park Row
New York, N. Y.

Affidavit of Benjamin J. Malcolm in Support of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3962
AFFIDAVIT

JAMES RHEM, ROBERT FREELY, LEO ROBINSON and EUGENE NIXON, individually and on behalf of all other persons similarly situated,

Plaintiffs,

—against—

BENJAMIN J. MALCOLM, Commissioner of Correction for the City of New York; ARTHUR RUBIN, Warden, Manhattan House of Detention for Men; ABRAHAM D. BEAME, Mayor, City of New York; PETER PREISER, Commissioner of Correction of the State of New York; HUGH CAREY, Governor, State of New York; and OWEN MCGIVERN, Presiding Justice, New York State Supreme Court, Appellate Division, First Department, individually and in their official capacities,

Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

BENJAMIN J. MALCOLM, being duly sworn, deposes and says that:

1. I am the Commissioner of the New York City Department of Correction and a defendant in the above encaptioned action. This affidavit is submitted in support of the defendants' motion to correct and amend and to stay judgment of this Court, dated February 20, 1975.

2. This Court, over defendants' objections has requested the Department to demonstrate why those factors found

to be constitutionally defective at the Manhattan House of Detention for Men (known as the Tombs) should not be applied to the receiving institution designated to receive Tombs transferees. (i.e. The New York City House of Detention for Men, located on Rikers Island).

3. While the defendants, at various points strenuously objected to this limited inquiry, and insisted that HDM be judged on its own merits, and its condition viewed as a totality, this Court, after accepting the defendants' offer of proof as to the totality of conditions at HDM, scheduled a hearing, on approximately two weeks notice, in which the defendants were required to show that HDM's lock out schedule, visitation program, optional lock out schedule and recreational program meet criteria that had been formulated and established upon its evaluation of conditions at the Manhattan House of Detention for Men.

4. On February 20, 1975, this Court entered the order that is now the subject of the instant motion. While this judgment recognizes that the conditions at the New York City House of Detention for Men are basically consistent with the standards that were enumerated upon review of conditions at the Tombs, it is apparent that the judgment, as promulgated by this Court, severely limits the ability of the warden and his assistants to effectively administer the New York City House of Detention for Men. This affidavit will enumerate those portions of this Court's order that interfere with such effective administration.

5. The instant judgment at paragraph 2 recognizes the necessity for, and permits the defendants to require inmates to be locked in their cells at such times as inmates are counted; and during times when the cells, tiers and flats are being cleaned. While the defendants are in full agreement with this portion of the judgment, it is respectfully submitted that other administrative tasks, fully explained in and supported by the record, similarly require that the inmates be locked in their cells at times designated by the defendants.

6. It is clear from the record that the inmates must be locked in during the hours set aside for sleeping from 9:30 P.M. until 5:15 A.M. Also, in the morning it is essential that the detainees are locked in for that short period necessary to permit the defendants to assemble those who are scheduled for court appearances. This assures that these detainees will be assembled and transferred as expeditiously as possible. And finally, it must be stressed that the physical construction of HDM's housing blocks requires that one-half of a block remain in their cells while the other half is at the morning and noon meal. The mess hall is on the B side of the block. There is no mess hall on the A side. If the A side is in the mess hall the B side must be locked in to prevent them from entering the mess hall. If the B side is in the mess hall the A side could still be kept on its side of the block without being locked in but then we would have a situation where the amount of time in for the sides is uneven. Therefore, it is essential that during the meal periods the side that is not eating must be locked in. In such an institutional set-

ting it is important as far as possible to avoid situations where the treatment of the detainees is unequal.

7. Moreover, the lock out schedule, as presently in force at HDM and as explained herein and amplified in the record, takes into account such other factors as the food preparation and distribution process, the frequent changes of officer shifts and officer mess relief. Thus, accounting for all of the above factors, the lock out schedule, in effect at HDM, allows inmates to be locked out of their cells at all times except during the periods utilized to perform the aforementioned administrative tasks and of course, during the hours required to permit the detainees to sleep in a relatively quiet atmosphere.

8. Thus, while the Court, in its memorandum opinion recognized the legitimacy of the institutional lock in schedule with respect to periods utilized for cleaning and counting, it is respectfully submitted that this Court take into account the above additional factors mentioned herein, factors which the plaintiffs never seriously contended could or should be performed while the inmates were locked out, and recognize that for reasons of administrative necessity, that the lock out schedule as practiced at HDM affords to inmates the maximum amount of lock out time taking into account the multitude of administrative tasks necessary to be performed at that institution.

9. With respect to paragraph 2(b) of the judgment, it is clear then that the lock out schedule, as set forth above

clearly establishes that said schedule is not a function of security but is in fact a matter of orderly institutional administration. For those inmates who do in fact present threats to the order and security of the institution, the HDM administrators have already established rules, regulations and practices that deal with such problems. This Court is aware that HDM has several "administrative segregation", sections housing inmates who are deemed to be escape risks (i.e., inmates confined to the 1B tier and members of the Giampetruzzi, et. al. class of inmates) or where their behavior patterns show an inability to adjust to institutional life (those confined in the 1A tier).

10. In these cases, the institution deals with such classes of inmates by assigning more capable officers to such housing areas and by affording such inmates more individualized attention. However, in none of the aforementioned classification areas does the institution impose more restrictive lock out practices, (except of course for inmates placed in punitive segregation after departmental hearings) and thus the institution uniformly locks in inmates of all classes only where administratively required.

11. Thus, while the Court at paragraph 2(b) of the judgment, has afforded the defendants the opportunity to impose a more restrictive lock out schedule on selective classes of detainees, it is the feeling of the administrators at HDM who have adopted a uniform lock out schedule consistent with the routine administrative functions performed at the institution, that they can more appropriately

deal with the various classes of inmates by methods other than varying lock out schedules on selected tiers (The sole exception to this, of course, the inmate who is placed on 24 hour lock-in not pursuant to an administrative classification but as a disciplinary measure) and that Section 2(b) should be deleted from the judgment.

12. With respect to the issue of optional lock in, as set forth in paragraph 3 of the Court's judgment, it should be noted that in its decision concerning conditions at the Manhattan House of Detention for Men, this Court ordered the Department to formulate an experimental plan calling for the implementation of a program of optional lock-in. It was thought that such a program would further the goal of providing inmates with a greater sense of privacy and consequently reduce tension in the institution. Said decision noted that the Tombs, at the time of trial (January, 1973) did not have an optional lock-in program.

13. While this Court had, in its opinion dated January 7, 1974 ordered the defendants to adopt, at the Tombs, an experimental optional lock out program, it should be noted that as of October, 1973, the New York City House of Detention for Men had already begun to adopt the full scale program of optional lock-in, that is now available to inmates during all lock-out hours, except on weekdays between 9-11 A.M. and 1-3 P.M.

14. In structuring this optional lock in program, however, the Warden must take into consideration its effect on his ability to properly run his institution. In doing so, Warden Thomas has determined that during weekday business hours, the programs and services afforded by HDM can be more expeditiously administered while inmates are in the common areas of the cell block. Said practice causes little hardship to the defendants. For, during the time when optional lock in is administratively unavailable (weekdays between 9-11 A.M. and 1-3 P.M.) the detainees have access to expansive lock out areas containing numerous television sets, as well as day rooms where inmates can socialize and engage in quiet games.

15. However, during these hours, when most institutional programs operate, imposition of optional lock out would create significant administrative burdens. First, at the varying times of programs or services are announced to the inmates, assembled in the common areas, the Correction Officer on duty can immediately ascertain which inmates desire to attend such programs, and can quickly see that the inmates desiring to participate are immediately escorted to the appropriate program or service area involved. This procedure avoids the serious delay which would otherwise occur in having the Correction Officer

unlock such detainees who may be incarcerated on any of three separate tiers within the cell block.

16. While the Court has stated that this problem could be resolved by having those inmates who desire lock in status to "waive" their rights to attend programs during such periods, said suggestion fails to take into account the nature and scope of the programs offered by HDM. For, several of the educational and cultural programs offered at HDM are requested by more inmates than can, at a given time, be accommodated. As a result, many inmates submit "request slips" in which they express their desire to be placed on waiting lists for entrance into such programs. Inasmuch as vacancies in such programs occur at sporadic and irregular intervals, it is probable that substantial inmate resentment will result when an opportunity to attend said program is lost even though the inmate may have, under the Court's proposal, "waived" his entrance into said program.

17. It is submitted, and it is supported by the record, that the administrators at HDM have established an extensive optional lock in program and, its administration, though subject to reasonable differences of opinion, should be left to the administrators who must deal with the problems likely to arise. It is therefore requested that paragraph 3 of the judgment be deleted.

18. With respect to the issue of inmate visitation as set forth in paragraphs 4 and 5 of the Court's judgment it is respectfully submitted that this Court amend the judgment to provide greater administrative flexibility. The defendants have stated that due to the particular suitability and location of HDM, the defendants shall offer to the Court a program calling for the implementation of contact visits. Since the defendants are not, as yet, in a position to evaluate the effects of this new program, it is impossible to tell at this point whether the proposed contact visitation program can be effective for each personal visit. Thus, the defendants respectfully request that this Court not direct that all personal visits be contact visits.

19. Moreover, this Court, at paragraph 4(b), provides that the defendants, upon application to the Court, may deny contact visits to inmates not meeting appropriate security criteria. Said judgment, thus requires the defendants, in every instance in which they desire to deny contact visits to a detainee to make an application to this Court. It is submitted that said procedure removes the administrative discretion that this Court intended to grant to the defendants in its order requiring the adoption of contact visitation for selected detainees. In addition, the precise numbers of visitation days should not be, fixed in the interest of allowing the defendants, if they so choose, to lengthen or vary the visitation schedule while assuring at least one week-night or weekend visit.

20. In addition, while this Court has set forth constitutional criteria in terms of the required numbers and length of visits, it is requested that the second sentence of paragraph 5(a) be deleted. For, the record shows that much of the waiting time that visitors sometimes face results from the fact that HDM personnel must assemble inmates from various parts of the institution. In order to reduce a visitor's waiting time, visits generally commence as soon as a reasonably substantial number of inmates are assembled. This results in approximated 30-40 visits afforded per visiting period. Athough this process will result in some booths not being used, the competition for the remaining booths that would result from the implementation of the decree will inevitably lead to conduct, on the part of inmate and visitor alike, not in the best interests of institutional order and decorum.

21. With respect to paragraph 7 of the judgment, it is respectfully urged that this institution be afforded the option of removing personal visits as an administrative sanction for violation of institutional rules. Unlike State institutions, this detention facility cannot remove an inmate's statutory good time or utilize any of a series of several sanctions available to administrators of sentence facilities. Nevertheless, the maintenance of order and decorum being no less crucial at this institution, it is respectfully urged that this Court allow the defendants to retain this one meaningful penalty remaining at our disposal to deal with disorderly inmates.

Affidavit of Benjamin J. Malcolm.

22. In addition to the administrative problems created by the judgment of this Court dated February 20, 1975, and fully explained above, defendants find that certain ambiguities exist within the judgment which make it impossible for us to proceed rationally in an attempt to comply. This motion is an essential step in clarifying our obligation in accordance with the February 20, 1975 judgment and pending the determination of said motion defendants respectfully request a stay.

23. It is also important to consider that parts of the judgment will require some long range planning by this department and until this motion is decided such planning must remain necessarily in abeyance.

WHEREFORE, it is requested that the motion be granted in its entirety.

Sworn to before me
this 3rd day of March 1975

BENJAMIN J. MALCOLM
BENJAMIN J. MALCOLM

DONALD J. COLENS
Notary Public, State of New York
(Illigible)
Certified in New York County
Commission Expires March 30, 1975

Judgment Annexed to Foregoing Affidavit.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3962

JAMES RHEM, ROBERT FREEMAN, LEO ROBINSON and EUGENE NIXON, individually and on behalf of all other persons similarly situated,

Plaintiffs,

—against—

BENJAMIN J. MALCOLM, Commissioner of Correction for the City of New York; ARTHUR RUBIN, Warden, Manhattan House of Detention for Men; ABRAHAM D. BEAME, Mayor, City of New York; PETER PREISER, Commissioner of Correction of the State of New York; HUGH CAREY, Governor, State of New York; and OWEN MCGIVERN, Presiding Justice, New York State Supreme Court, Appellate Division, First Department, individually and in their official capacities,

Defendants.

This action having been tried by this court, Honorable Morris E. Lasker presiding, and the court having made and filed findings of fact and conclusions of law dated January 7, 1974, and having filed an order July 11, 1974; and the Court of Appeals by decision dated November 8, 1974 having affirmed this court's findings of fact and conclusions of law as to the unconstitutionality of conditions at the Manhattan House of Detention for Men (the Tombs), and having remanded for further consideration of the remedy to be provided; and the City defendants having terminated the use of the Manhattan House of Detention for

the custody of any members of the plaintiff class and having transferred to the House of Detention for Men at Rikers Island, members of the plaintiff class who were, up to the time of transfer, in custody at the Manhattan House of Detention; and

Plaintiffs having presented a proposed judgment intended to insure that inmates transferred from the Manhattan House of Detention for Men are afforded treatment at the House of Detention for Men on Rikers Island consistent with the findings set forth in the court's opinion of January 7, 1974; and

The court having visited the House of Detention for Men on Rikers Island in the company of the parties and counsel and having heard testimony and taken evidence on the 10th, 13th and 30th days of January, 1975, to determine the applicability of the court's prior rulings regarding the issues of contact visits, visiting schedules, inmate classification, lock-out time and optional lock-in, to the House of Detention for Men at Rikers Island, and having considered the evidence presented and upon all the pleadings had herein,

And the plaintiffs and defendants having made a motion pursuant to Rule 59(e) and 62(b) to amend, correct and to stay the implementation of the judgment dated February 20, 1975, it is hereby

ORDERED, ADJUDGED and DECREED that defendants, their agents and employees and all persons acting in concert with them are hereby ordered to extend the following conditions of incarceration to the members of plaintiffs class who are currently housed at the House of Detention for Men at Rikers Island:

Judgment.

1. Classification

Within ninety days of the entry of this judgment, defendants shall establish a classification system for purposes of implementing paragraph 2(b) below.

2. Contact Visits

(a) Within ninety days of the entry of this judgment defendants will submit a plan for the implementation of contact visits.

(b) Defendants, will, within ninety days establish the classification system in conjunction with the implementation of paragraph 2(a).

3. Visiting Schedule for Personal Visits

(a) The visiting schedule for personal visits shall be arranged to assure each member of the plaintiff class a minimum of one weekly visit at night or on a Saturday or Sunday. Each visit shall last a minimum of one-half hour.

4. Recreation

Defendants shall forthwith take all steps necessary to employ such additional correctional personnel as is necessary to afford every detainee a period of one hour outdoor exercise, Mondays through Fridays inclusive, except in inclement weather. Defendants shall permit detainees to possess warm outer garments and shall provide warm outer garments to indigent detainees to facilitate outdoor recreation in cold weather.

5. Discipline

The provisions of Paragraph 4 and Schedule A of this court's judgment of March 22, 1974 shall be observed by

defendants in respect to all members of the plaintiff class except to the extent stayed by this court's order of July 31, 1974.

6. Correspondence

The provisions of Paragraphs 1-3 of this court's judgment of March 22, 1974 shall be observed by defendants in respect to all members of the plaintiff class.

Dated: New York, New York
March , 1975

.....
U.S.D.J.

Plaintiffs' affidavit in opposition to defendants' motion to correct judgment of 2-20-75

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3962 (MEL)
AFFIDAVIT

JAMES RHEM, et al.,

Plaintiffs,

—against—

BENJAMIN J. MALCOLM, et al.,

Defendants.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

STEVEN HERMAN, being first duly sworn deposes and says:

1. I am one of the attorneys for plaintiffs in the above titled case.

2. I submit this affidavit in opposition to defendants' motion of March 3, 1975 to amend the Court's Judgment of February 20, 1975.

3. Plaintiffs' opposition to defendants' motion is based entirely upon the extensive record in this case, including this Court's findings of fact and conclusion of law as affirmed by the Court of Appeals. Accordingly, plaintiffs' main arguments in opposition to defendants' motion are contained in the Memorandum accompanying this affidavit, and there is no need to recite those arguments herein.

Plaintiffs' Affidavit.

4. Further, plaintiffs have attached to this affidavit a letter written to the Court by Deputy Commissioner William Donnino of the State Department of Correctional Services in the case of *Giampetruzzi* v. *Malcolm* (72 Civ. 4735), thereby making it part of the record of this case as well. The letter refutes en toto defendants' interpretation of the State Department's regulations concerning the availability of contact visits for convicts being confined in punitive segregation.

WHEREFORE, defendants' motion to amend the judgment of February 20, 1975 should be denied.

Dated: New York, New York
March 19, 1975

STEVEN HERMAN

Sworn to before me this
19th day of March, 1975

NICHOLAS RODRIGUEZ, JR.
Notary Public

NICHOLAS RODRIGUEZ, JR.
Notary Public, State of New York
No. -8613785
Qualified in Bronx County
Commission Expires March 30, 1976

Exhibit A.

Letter March 6, 1975, Annexed to Foregoing Affidavit.

STATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICES
THE STATE OFFICE BUILDING CAMPUS
ALBANY, N.Y. 12226

(SEAL)
BENJAMIN WARD
COMMISSIONER

March 6, 1975

Honorable Morris E. Lasker
Judge
United States District Court
Southern District of New York
United States Court House
New York, New York 10007

Dear Judge Lasker: Re: *Giampetruzzi* v. *Malcolm*

I am in receipt of your letter of March 4, 1975 concerning the above-captioned case and requesting that I advise you of the State Department of Correctional Services' policy with respect to visits for inmates confined in a segregation unit.

The Department's policy with respect to the administration of special housing units and segregation units are published in Chapter VI of Title 7 of the Official Compilation of the Codes, Rules and Regulations of the State of New York.

The rules, in part, provide the minimum standards in the operation of a segregation unit irrespective of the purpose for which an inmate is placed in the unit. 7 NYCRR Part 301.

In brief, no inmate in a segregation unit can be denied a visit solely on the grounds of his presence in a segregation unit; nor may he be denied a visit for the purpose of punishment or discipline. 7 NYCRR § 301.6 and 301.8.

Certain conditions precedent to the visit (for example, dress, appearance and submissiveness to a search) may be required; but generally the conditions precedent to the visit are substantially the same for an inmate in a segregation unit or in general population. Depending upon the institution, the search of an inmate in a segregation unit prior to or after a visit may be more extensive than the search of an inmate in general population.

The conditions under which the visit takes place are generally the same for an inmate in general population or a segregation unit.

Sincerely,

WILLIAM C. DONNINO
William C. Donnino
Deputy Commissioner and Counsel

WCD/kt

Memorandum of District Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3962
MEMORANDUM

JAMES RHEM, ROBERT FREELY, LEO ROBINSON, and EUGENE NIXON, individually and on behalf of all other persons similar situated,

Plaintiffs,

—against—

BENJAMIN J. MALCOLM, Commissioner of Correction for the City of New York; ARTHUR RUBIN, Warden, Manhattan House of Detention for Men; ABRAHAM D. BEAME, Mayor, City of New York; PETER PREISER, Commissioner of Correction of the State of New York; HUGH CAREY, Governor, State of New York; and OWEN McGIVERN, Presiding Justice, New York State Supreme Court, Appellate Division, First Department, individually and in their official capacities,

Defendants.

APPEARANCES:

THE LEGAL AID SOCIETY
15 Park Row
New York, New York 10038
Attorneys for Plaintiffs
Of Counsel: WILLIAM E. HELLERSTEIN, Esq.
JOEL BERGER, Esq.
STEVEN A. HERMAN, Esq.

W. BERNARD RICHLAND, Esq.
Corporation Counsel
Municipal Building
New York, New York 10007
Attorneys for Defendants BENJAMIN J. MALCOLM, ARTHUR RUBIN and ABRAHAM D. BEAME
Of Counsel: DONALD TOBIAS, Esq.
Assistant Corporation Counsel

LOUIS J. LEFKOWITZ, Esq.
Attorney General of the State of New York
World Trade Center II
New York, New York 10047
Attorneys for Defendants PETER PREISER, HUGH CAREY and OWEN McGIVERN
Of Counsel: DAVID BERMAN, Esq.

Memorandum of District Court.

LASKER, D.J.

Plaintiffs and the City defendants move under Rule 59(e) of the Federal Rules of Civil Procedure to alter our judgment of February 20, 1975.[1]

1. Plaintiffs' requests for relief.

A. *Number of Visitors.*

Plaintiffs propose that the judgment be amended by providing that members of the plaintiff class be permitted to receive at least three visitors per visit. In support of their proposal, they refer us to our opinion after trial, 371 F.Supp. 594, 606, in which we found that members of the plaintiff class, then housed at the Tombs, had at one time been allowed three visitors, that New York State prisoners were accorded three visitors at a time and occasionally four, and that the "one visitor" rule then in effect at the Tombs was "unnecessarily restrictive." It is argued that our opinion at 371 F.Supp. at 607, "called for 'more acceptable standards of . . . number of visitors.'" The argument is not sound for several reasons. While we did find after trial that there had been a period before trial when members of the plaintiff class housed at the Tombs had been allowed three visitors at a time, and that State prisoners were then permitted three or four visitors, our

ruling that detainees at the Tombs ought then to be allowed more than one visitor at a time was based primarily on our finding that conditions as they stood at the Tombs were "unnecessarily restrictive" (emphasis added). The use of the word "unnecessarily" was deliberate. It represented a determination that the visiting facilities at the Tombs were sufficiently spacious to permit more than one visitor at a time to meet with an inmate. This being so, to deny such a privilege would have breached the rule that a pre-trial detainee is entitled to the rights of other citizens except to the extent necessary to assure his appearance at trial and the security of the institution. However, while the trial record established that more than one visitor at a time could be accommodated at the Tombs, there is no evidence of record as to the capacity of visiting facilities at Rikers Island.

Nor does the record contain any evidence upon which we would be justified in making a finding that, without reference to the physical conditions at a particular institution, a detainee has a constitutional right to receive a minimum number of visitors at a time.

It should be added that the statement in plaintiffs' brief that our opinion at 371 F.Supp. 607 "called for 'more acceptable standards'" etc., is misleading. The precise

quotation is "We are persuaded that given adequate manpower, the Department could and willingly would meet more acceptable standards of visiting hours and days and number of visitors." This passage must be read in light of our holding not that plaintiffs had established a constitutional right to receive a minimum number of visitors, but a constitutional right to enjoy full reasonable use of the detention facilities.

B. *Visiting Schedules.*

Plaintiffs propose that we amend our judgment by specifying a) that visiting facilities be open from 9:00 A.M. to 9:00 P.M. seven days a week; b) that every visit last a minimum of two hours and c) that detainees be permitted to receive visits daily. Our memorandum of February 20, 1975, accompanying the judgment of that date, stated (at page 14) that the constitutional norm as to the visiting rights of a detainee "ought to be a reasonable number of opportunities for visits of reasonable duration" and we pointed out that "it must be remembered that we are here dealing with constitutional rights which set minimal, not maximum or 'desirable' standards." Applying these criteria, we find nothing in the material submitted by plaintiffs on this motion which would justify amendment of the schedule in the judgment of February 20th. We fully recognize the desirability of an expanded visiting schedule,

longer visiting periods per inmate and a greater number of visits and visitors per inmate, but there is no evidence of record before us to establish a constitutional right to minimums at the levels proposed by plaintiffs' memorandum. We are conscious of the phrases used in such trail blazing cases as *Brenneman* v. *Madigan,* 343 F.Supp. 128, 141 (N.D. Cal. 1972) and *Jones* v. *Wittenberg,* 330 F. Supp. 707, 717, *aff'd sub nom. Jones* v. *Metzger,* 456 F.Supp. 854 (6th Cir. 1972), but neither of these significant decisions grappled with the question of the precise number and length of visits or numbers of visitors to which a detainee is constitutionally entitled, and none of them sets a specific precedent for the schedule proposed by the plaintiffs.

C. *Recreation.*

1. *Number of recreational periods.* The February 20th judgment ordered the City to "take all steps necessary to employ such additional correctional personnel as was necessary to afford every detainee a period of one hour outdoor exercise Mondays through Fridays inclusive, except in inclement weather." Plaintiffs ask that the City be required to provide exercise periods seven days a week. Two arguments are made in support of this request. They first point to the standards of such important agencies as

the United Nations and the American Correctional Association as well as the testimony of Dr. Karl Menninger at trial which all specify a requirement that prisoners enjoy daily exercise. While we respect these standards and views highly, as our favorable references to them at 371 F.Supp. 611 and 626-7 attest, nevertheless they do not automatically establish constitutional norms, nor have we held that they do.

Second, plaintiffs express concern that our memorandum of February 20th "denied weekend recreation periods by balancing defendants' financial resources against plaintiffs' need for said exercise." This is a misconstruction of our memorandum of February 20th. In ordering an increase in recreational opportunities from one 50 minute period per week to five 50 minute periods per week, we explicitly recognized the additional financial expenditure imposed on the City but cited Justice (then Judge) Blackman in *Jackson* v. *Bishop,* 404 F.2d 571, 580 (8th Cir. 1968) to the effect that "constitutional requirements are not, . . . to be measured or limited by dollar considerations . . ." We went on to state that the expansion to five periods per week will "bring [the recreational program] within the ambit of constitutional standards." Our reference to the balancing of benefits to the plaintiffs against even greater financial burdens to the City related only

to the consideration of expending the recreational period beyond the constitutional standard which we had already found was met by a five period per week program. We did not and we do not believe it sound doctrine that constitutional rights can be limited by money considerations.

2. *Implementation Deadline.* Plaintiffs request that we set a deadline for the implementation of the expansion of recreational facilities. The question may now be moot in view of the fact that even by past practice the outdoor recreational facilities have been put into use in late May, and that, in any event, our judgment of February 20th ordered the defendants to take the necessary action to provide additional recreation "forthwith." However, in light of the history of the case, which has involved endless delay of implementation by the City, an amended judgment will provide that such action is to be completed no later than June 1, 1975.

II. Defendants' Requests for Relief.

A. *Right to Leave Cells.*

The February 20th judgment provided that within 60 days defendants should permit plaintiffs to leave their cells at all times except for such reasonable periods as may be necessary for defendants to count the population and to clear the institution.

Memorandum of District Court.

Defendants request clarification from the court as to whether this provision of the judgment was intended to prevent lock-in for three other purposes:

1. Post-breakfast lock-in to provide services for inmates scheduled to appear in court;

2. Lock-in of one side of the cell block while the other side of the cell block is eating; and

3. Night time lock-in.

It was not our intention that the judgment of February 20th should prevent these periods of lock-in. The theory upon which all the holdings in this case, both by the District Court and the Court of Appeals, are based, is that a detainee has the right to be held in custody by the least restrictive method necessary fo. security or administration of the institution. The three periods in question meet that test. It is clearly necessary to make arrangements for inmates scheduled to appear in court. Secondly, given the particular structure of the cell blocks at HDM, it is justifiable that inmates on one side be locked in while their fellow inmates on the other side are eating. This is so because each cell block contains only one eating facility (located on Side B). Permitting inmates housed on both sides to move at large on the B side during the feeding period would lead to unmanageable crowding of the mess hall or unauthorized

attempts by inmates to secure a second ration. Thirdly, the justifiability of lock-in during night time is to be measured by the reasonableness of the period involved and the reasonableness of the time at which it occurs. We cannot say that an eight hour sleeping or quiet period commencing at 9:30 in the evening is unreasonable in either respect.

While the judgment will therefore be amended to clarify these points, we reiterate the observation made at page 8 of the February 20th memorandum that inmates may not be ". . . locked in their cells for periods longer than actually required or as a pretext for the unjustified imposition of maximum security."

B. Defendants request that we eliminate subparagraph 2(b) of the judgment. We decline to do so except to the extent of eliminating the requirement that the defendants apply to the court for permission to impose a more restrictive lock-in schedule upon selected detainees in instances where the defendants can establish, based upon the classification system to be inaugurated, that implementation of the provisions of paragraph 2 as to these detainees jeopardizes institutional security.

C. *Optional Lock-in.*

We are asked to eliminate the provisions of Paragraph 3 affording the right of optional lock-in. We decline to do

so. Nothing contained in the material presented by the defendants on this motion contains new evidence or establishes that the court has overlooked any of the evidence or arguments heretofore made on the subject.

Defendants also contend that the provisions of the judgment requiring optional lock-in to be inaugurated on an experimental basis would create problems by granting optional lock-in benefits to those in the cell blocks where the experiment was being conducted and not to others. The provision for inaugurating the program on an experimental basis was made on the basis of earlier testimony that such a change would require administrative planning. Since we are dealing with constitutional rights which cannot be denied, the sole alternative to ordering an optional lock-in plan on an experimental basis is to permit the administration to inaugurate the plan throughout the institution at the same time. The judgment will be amended to grant such an option.

D. *Visitation*

1. *Number of visits per week.* The defendants request that we eliminate the provisions of Paragraph 5(b) ordering the defendants not to reduce the present number of visits per week. They claim the restraint thus imposed will prevent them from experimenting with more liberalized

visiting schedules. To accommodate the desirable objective of experimenting with an improved visiting schedule with the requirement of adequate visiting time, Paragraph 5(b) of the judgment will be amended to read: "The present number of visiting hours per week shall not be reduced."

2. *Contact Visits.* Four years after the commencement of this litigation, more than a year after the post-trial opinion requiring the City to provide a plan for contact visiting, and months after the Court of Appeals' affirmance of that decision, defendants suggest that we eliminate our requirement that a contact visiting program be implemented in 90 days. At this late date, they continue to suggest that they be permitted to submit a program for contact visiting and that they be permitted to continue the use of the present glass walled visiting booths "in conjunction with the contact visit facilities to be constructed." We emphatically decline to grant the relief requested. We have been advised in open court on numberless occasions by the City's counsel that the City "had a plan" for contact visits, that the City "would present a plan" for contact visits or that the City was "in the process of preparing a plan" for contact visits. Yet to this day the City has not submitted the most tentative of suggestions as to the implementation of this key issue. We

have at all times throughout this litigation indicated our willingness to allow the City a reasonable period of time to make the changeover to contact visiting. The 90 day allowance provided in our judgment of February 20th, the effect of which has been stayed to this moment, when added to the period since January of 1974, during which the City has been on notice and when considered in the light of the Court of Appeals' observation, 507 F.2d 333, 339, that:

> "If the handwriting was not yet clearly on the wall, it was at least more than barely legible to an interested reader. The City's claim that overall it did not have enough time to submit its plan is not persuasive."

adds up to a sorry history which cannot conceivably be prolonged.

3. Defendants also ask us to eliminate the provisions of Paragraph 4(b). We decline to do so except to the extent of eliminating the requirement that the defendants apply to the court for permission to deny contact visits to selected detainees in instances where the defendants can establish, based upon the classification system to be inaugurated, that granting contact visits to those detainees jeopardizes institutional security.

E. *Discipline.*

Our judgment of March 22, 1974, enjoined the City from denying visitation rights to a prisoner who was either in administrative or punitive segregation. The ruling was based on a finding that the practice violated the equal protection clause because State prisoners in segregation were allowed normal visiting rights and there was no rational justification for different treatment of City and State prisoners. Based on a convoluted argument that we have misconstrued the State regulations in question, in particular 7 NYCRR § 301, and that the State in fact does limit visitation rights of segregated prisoners, the City asks us to eliminate the incorporation of a similar provision in our judgment of February 20, 1975. We disagree with the analysis of the State regulations set forth in defendants' memorandum. Moreover, the determination of the issue depends not only on the construction of the regulations but on their implementation in actual practice. Because neither party presented evidence on this point the court, with consent of counsel, requested the Commissioner of the Department of Correctional Services of the State of New York to inform it of the State practice. On March 6, 1975, William C. Donnino, Deputy Commissioner and Counsel to the Department, advised the court in relevant part as follows:

Memorandum of District Court.

"In brief, no inmate in a segregation unit can be denied a visit solely on the grounds of his presence in a segregation unit; nor may he be denied a visit for the purpose of punishment or discipline. 7 NYCRR § 301.6 and 301.8.

"Certain conditions precedent to the visit (for example, dress, appearance and submissiveness to a search) may be required; but generally the conditions precedent to the visit are substantially the same for an inmate in a segregation unit or in general population. Depending upon the institution, the search of an inmate in a segregation unit prior to or after a visit may be more extensive than the search of an inmate in general population.

"The conditions under which the visit takes place are generally the same for an inmate in general population or a segregation unit."

Under the circumstances, we decline to delete the provisions of Paragraph 7 of our judgment of February 20, 1975, which incorporates Paragraph 5 of our judgment of March 22, 1974.

We are concurrently filing an amended judgment in accordance with this memorandum.

Dated: New York, New York
April 23, 1975.

MORRIS E. LASKER
U.S.D.J.

FOOTNOTES

1. Plaintiffs' motion is also noticed under Rule 60(a) which relates to clerical mistakes. Nothing was contained in their papers pointing out any clerical mistakes and we knew of none. Consequently know of no relief that can be granted under that rule. Defendants' motion is also noticed under Rule 62(b) covering stay of execution of the judgment pending a Rule 59 motion. Such a stay has been granted and no further stay from the relief of our judgment of February 20, 1975 is granted or to be implied from the terms of this memorandum except as explicitly set forth in this memorandum or the judgment of February 20th.

Amended Judgment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3962
AMENDED JUDGMENT

JAMES RHEM, ROBERT FREELY, LEO ROBINSON, and EUGENE NIXON, individually and on behalf of all other persons similarly situated,

Plaintiffs,

—against—

BENJAMIN J. MALCOLM, Commissioner of Correction for the City of New York; ARTHUR RUBIN, Warden, Manhattan House of Detention for Men; ABRAHAM D. BEAME, Mayor, City of New York; PETER PREISER, Commissioner of Correction of the State of New York; HUGH CAREY, Governor, State of New York; and OWEN MCGIVERN, Presiding Justice, New York State Supreme Court, Appellate Division, First Department, individually and in their official capacities,

Defendants.

This action having been tried by this court, Honorable Morris E. Lasker presiding, and the court having made and filed findings of fact and conclusions of law dated January 7, 1974, and having filed an order July 11, 1974; and the Court of Appeals by decision dated November 8, 1974 having affirmed this court's findings of fact and conclusions of law as to the unconstitutionality of conditions at the Manhattan House of Detention for Men (the Tombs), and having remanded for further consideration of the remedy to be provided; and the City defendants having terminated the use of the Manhattan House of Detention for the custody of any members of the plaintiff class and having transferred to the House of Detention for Men at Rikers Island, members of the plaintiff class who were, up to the time of transfer, in custody at the Manhattan House of Detention; and

Amended Judgment.

Plaintiffs having presented a proposed judgment intended to insure that inmates transferred from the Manhattan House of Detention for Men are afforded treatment at the House of Detention for Men on Rikers Island consistent with the findings set forth in the court's opinion of January 7, 1974; and

The court having visited the House of Detention for Men on Rikers Island in the company of the parties and counsel and having heard testimony and taken evidence on the 10th, 13th and 30th days of January, 1975, to determine the applicability of the court's prior rulings regarding the issues of contact visits, visiting schedules, inmate classification, lock-out time and optional lock-in, to the House of Detention for Men at Rikers Island, and having considered the evidence presented and upon all the pleadings had herein, it is hereby

ORDERED, ADJUDGED and DECREED that defendants, their agents and employees and all persons acting in concert with them be and hereby are permanently enjoined from incarcerating any detainee who is a member of the plaintiff class and is currently housed at the House of Detention for Men at Rikers Island, except under the following conditions:

1. Classification

Within ninety days of the entry of this judgment, defendants shall establish a classification system for purposes of implementing paragraphs 2(b) and 4(b) below.

2. Right to Leave Cells

(a) Within sixty days of the entry of this judgment,

defendants shall permit plaintiffs to leave their cells at all times except for such reasonable periods as may be necessary to conduct counts of the population, clean the institution, arrange for court appearances, provide meals to inmates and provide a quiet sleeping period of no longer than eight hours, starting no earlier than 9:30 P.M.

(b) Defendants, upon establishing the classification system referred to in Paragraph 1 of this judgment, may impose a more restrictive lock-in schedule upon selected detainees in instances where defendants can establish, based upon said classification system, that implementation of subparagraph (a) of this paragraph would jeopardize institutional security.

3. Optional Lock-in

(a) Within sixty days of the date of entry of this judgment, defendants shall commence a program of optional lock-in during activity periods in two cell blocks chosen by the Warden of the House of Detention for Men at Rikers Island. Inmates in such cell blocks choosing to remain locked in their cells during activity periods shall have the option to do so.

(b) In the event that upon the expiration of thirty days after the commencement of such expanded optional lock-in the Warden of the House of Detention for Men at Rikers Island determines that it is not practical or feasible to extend such optional lock-in to all the members of the plaintiff class, he shall report to the court in writing his reasons for such a conclusion, furnishing a copy of such

report to the attorneys for the plaintiffs. Within ten days thereafter counsel for the plaintiffs shall respond in writing to the court furnishing a copy of their response to attorneys for the defendants. Thereafter, the court will determine whether the program of expanded optional lock-in shall be eliminated, further tested or applied to all members of the class within the institution.

(c) Unless the Warden of the House of Detention for Men at Rikers Island shall timely furnish the court with the report referred to in the previous paragraph, then upon the expiration of the sixtieth day after the commencement of such expanded optional lock-in, all members of the plaintiff class shall be entitled to and receive such expanded optional lock-in.

(d) At the option of the defendant, Commissioner of Corrections for the City of New York, may commence the expanded optional lock-out program specified in sub-paragraph (a) above simultaneously in all cell blocks of the House of Detention for Men. Whether the Commissioner exercises the option provided in this sub-paragraph (d) or not, the procedures specified in sub-paragraphs (b) and (c) above shall be followed.

4. Contact Visits

(a) Within ninety days of the entry of this judgment all personal visits accorded plaintiffs shall be contact visits.

(b) Defendants, upon establishing the classification system referred to in Paragraph 1 of this Judgment, may deny contact visits to selected detainees in instances where defendants can establish, based upon said classification system, that contact visits would jeopardize institutional security.

5. Visiting Schedule for Personal Visits

(a) The visiting schedule for personal visits shall be arranged to assure each member of the plaintiff class a minimum of one weekly visit at night or on a Saturday or Sunday. Every visit shall last a minimum of one-half hour and shall not then be terminated unless the visiting facilities are filled to capacity and additional visitors are waiting, in which case those visits which have lasted the longest in excess of the minimum shall be terminated first.

(b) The present number of visiting hours per week shall not be reduced.

6. Recreation

Defendant shall forthwith and no later than June 1, 1975 take all steps necessary to employ such additional correctional personnel as is necessary to afford every detainee a period of one hour outdoor exercise, Mondays through Fridays inclusive, except in inclement weather. Defendants shall permit detainees to possess warm outer garments and shall provide warm outer garments to indigent detainees to facilitate outdoor recreation in cold weather.

7. Discipline

The provisions of Paragraphs 4 and 5 and Schedule A of this court's judgment of March 22, 1974 shall be observed by defendants in respect to all members of the plaintiff class except to the extent stayed by this court's order of July 31, 1974.

8. Correspondence

The provisions of Paragraphs 1-3 of this court's judgment of March 22, 1974 shall be observed by defendants in respect to all members of the plaintiff class.

Dated: New York, New York
April 23, 1975.

MORRIS E. LASKER
U.S.D.J.

Plaintiff's Notice of Motion for an Order to reopen the hearing.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3962
NOTICE OF MOTION

JAMES RHEM, *et al.*,

Plaintiffs,

—against—

BENJAMIN J. MALCOLM, *et al.*,

Defendants.

PLEASE TAKE NOTICE that upon the annexed affidavit of Joel Berger, Esq., and exhibits annexed thereto, and all prior proceedings had herein, the undersigned will move this Court on the 15th day of May, 1975, at the United States Courthouse, Foley Square, New York, New York, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order pursuant to Rules 59(a) and 60(b) of the Federal Rules of Civil Procedure reopening the hearing conducted by this Court on January 10, 13 and 30, 1975 and the Court's amended judgment of April 23, 1975, concerning conditions at the New York City House of Detention for Men, and granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
May 5, 1975

Yours, etc.

JOEL BERGER
WILLIAM E. HELLERSTEIN
JOEL BERGER
STEVEN A. HERMAN
The Legal Aid Society
Prisoners' Rights Project
15 Park Row
New York, New York 10038
[212] 374-1737

Affidavit of Joel Berger in Support of Motion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3962

AFFIDAVIT

JAMES RHEM, *et al.*,

Plaintiffs,

—against—

BENJAMIN J. MALCOLM, *et al.*,

Defendants.

JOEL BERGER, being duly sworn, deposes and says:

1. I am Assistant Attorney-in-Charge of the Legal Aid Society Prisoners' Rights Project, and am one of the attorneys for plaintiffs in the above-entitled case.

2. This affidavit is submitted in support of plaintiffs' motion pursuant to F.R.Civ.P. 59(a) and 60(b) to reopen the hearing conducted by this Court on January 10, 13 and 30, 1975 and the Court's amended judgment of April 23, 1975, concerning conditions at the New York City House of Detention for Men.

3. This motion is made in good faith and has not been interposed for purposes of delay.

4. Plaintiffs' attorneys are submitting this motion because it is now apparent that we misunderstood this Court's view as to our obligation to present affirmative testimony at the January, 1975 proceeding. This affidavit is intended to explain to the Court how this misunderstanding arose on our part, and to describe the kind of record we could have established and still can establish at a reopened proceeding.

Affidavit of Joel Berger.

RIGHT TO LEAVE CELLS

5. Plaintiffs' attorneys approached the January hearing with the conviction that this Court's initial opinion and that of the Court of Appeals requires the establishment of non-maximum security housing arrangements through relaxation of defendants' lock-in policies for the majority of the plaintiff class. This belief is based upon the following language in the opinions:

> We have found that MHD is capable of classifying inmates to determine those who do and do not require maximum security custody, and that most detainees can be safely held under less restraint. It follows that the rights of the latter group are abridged by being held in maximum security since the conditions of their incarceration do not ". . . cumulatively, add up to the least restrictive means of achieving the purpose requiring and justifying the deprivation of liberty." Hamilton v. Love, *supra*, 328 F.Supp., at 1192. Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 5 L.Ed.2d 231.
>
> The imposition of maximum security confinement (including lock-ins in cells of 16 hours per day) on those detainees in whose cases it is not necessary, violates their rights to due process by punishing them although they are unconvicted, and violates their rights to equal protection of the laws by unnecessarily treating them more harshly than convicts or bailees. 371 F.Supp. at 624.
>
> * * *
>
> All detainees are kept in maximum security conditions and are locked in a cage-like cell 16 hours a day, as a result of appellant's failure to establish a classification system to winnow out the approximately 20 per cent for whom maximum security might be necessary. 507 F.2d at 337.

6. It was also plaintiffs' belief that the purpose of the January, 1975 hearing was solely to determine what differences exist between the Tombs and HDM as to the issues initially decided in plaintiffs' favor. Thus, at a prehearing conference the Court stated specifically with regard to the issue of lock-out time:

> I have specified before and, if necessary, I will do it in writing again and in the record and every other way, and by exclusion of evidence, if it has to be at any hearing, that I am only interested in differences between the Tombs and Riker's Island. (Minutes of December 20, 1974, P.44).

At the outset of the hearing, the Court again stated that its inquiry was limited to determining "what factual differences exist between Rikers Island and the Tombs" (Minutes of January 10, 1975, P.4).

7. However, at no time during the hearing did defendants show or even attempt to show any significant differences between the maximum security lock-in regimen at the Tombs and that at HDM. Instead, defendants' presentation dealt with day-to-day practices common to both institutions.

8. Plaintiffs' attorneys, believing that the law of the case already establishes the right of most plaintiffs to non-maximum security housing through relaxation of defendants' lock-in policies, believed that in the absence of any showing or differences between the two institutions plaintiffs would be entitled to relief on this issue. It appeared to us that any additional expert testimony on this subject would be outside the scope of the hearing, wasteful of the Court's time, and indeed contrary to the directive of

the Court of Appeals that re-litigation of the case be avoided. 507 F.2d at 341.

9. It is apparent from the Court's Memorandum of April 23, 1975, which upholds defendants' current lock-in policies at HDM in the absence of any showing of significant differences from the policies previously in force at the Tombs, that further evidence should have been introduced by plaintiffs on this issue. If we had realized that in this Court's view the present housing conditions and procedures at HDM might still be consistent with the Court's initial opinion, as affirmed, we could have made a substantial showing to the contrary at the hearing. For example, plaintiffs could have called Donald Goff, a distinguished correctional expert whose testimony was frequently relied upon in the initial opinion. Mr. Goff, in an affidavit annexed hereto as Exhibit A, flatly asserts that the present lock-in schedule at HDM results in the unnecessary blanket imposition of maximum security housing upon all detainees. At a re-opened hearing, Mr. Goff could testify as to why the current housing arrangements at HDM constitute maximum security confinement. He could discuss the various other housing arrangements under which additional freedom of movement can safely be accorded to medium and minimum security detainees at HDM. He could describe how numerous medium and minimum security facilities perform routine administrative tasks without locking up prisoners.

10. Since a detainee spends virtually the entire day in his housing area, the issue of providing non-maximum security housing for the majority of detainees is fundamental to this case. We respectfully request that the detainees whose rights are at stake in this proceeding not be penalized because their attorneys misunderstood the Court's position and thereby failed to present significant testimony which could very much have strengthened the record on plaintiffs' behalf.

NUMBER OF VISITORS

11. Regarding the right to have more than one visitor per visit, plaintiffs once again believed that defendants were obligated to show differences between HDM and the Tombs if plaintiffs were to be denied any of the rights granted in the Court's initial opinion. However the Court's Memorandum of April 23, 1975 indicates the belief that on this particular issue the burden was upon plaintiffs, stating that "? . . . while the trial record established that more than one visitor at a time could be accommodated at the Tombs, there is no evidence of record as to the capacity of visiting facilities at Rikers Island." (Memorandum, p. 2).

12. This Court has already toured the visiting facilities of the Tombs and HDM and, in another context, has received evidence that the volume of visiting at HDM today is only about 50% of the volume at the Tombs at the time of trial. See transcript of January 21, 1975, pp. 334-35.

Nonetheless, had plaintiffs' attorneys known that the burden was being placed upon them on this issue, we could have obtained precise measurements as to the size of the booths, booth corridors and waiting areas at both institutions. Our visual impression at the time of the tours was that these facilities are comparable in size, and that HDM is no less capable of receiving more than one visitor at a time than the Tombs.

VISITING SCHEDULE

13. Plaintiffs' attorneys have sought diligently for the past several weeks to obtain copies of the precise visiting schedules set in response to the decisions in *Brenneman* v. *Madigan,* 343 F.Supp. 128 (N.D. Cal. 1972) and *Jones* v. *Wittenberg,* 330 F.Supp. 707 (N.D. Ohio 1971). Unfortunately, we were unable to obtain this material from the law offices which represented plaintiffs in those cases in time to make a submission to this Court prior to the issuance of its Memorandum of April 23rd. However, we have since succeeded in obtaining information as to these visiting schedules.

14. *Brenneman* resulted in visiting hours on Sunday from 11:30 A.M.-3:30 P.M., and on Tuesday, Wednesday and Thursday evenings from 6 P.M.-8 P.M. The three weekday evening periods to accommodate working people were established at a cost of over $100,000 for outdoor lighting and other construction work, plus $71,688 for increased staffing. In addition, Judge Zirpoli required that Sunday visiting be extended an additional hour beyond the 11:30 A.M.-2:30 P.M. schedule proposed by the

defendants. See Order Approving Visiting Hours, dated October 30, 1972, and Defendants' Return to Court Order of May 12, 1972, pp. 8-11, annexed hereto as Exhibit B.

15. The *Brenneman* order places no limit on the number of visits each inmate may receive each week or on the length of each visit. To double check this, I called Alan Neckritz, Esq., of the Almeda County Legal Aid Society, counsel for plaintiffs in *Brenneman.* He confirmed that each detainee may indeed receive a visit on each of the three weekday evenings as well as on Sunday. He further stated that the institution is flexible about the length of visits, asking visitors to leave only if the facility is crowded.

16. *Jones* resulted in a visiting schedule similar to that in *Brenneman.* The visiting facilities are open Monday through Friday evenings from 6 P.M.-9 P.M., and on Saturday and Sunday from 12:30 P.M.-7:30 P.M. Each detainee may receive four visits per week: two on weekday evenings, one on Saturday and one on Sunday. Each visit lasts an hour in length. See Affidavit on Joseph F. Vargas, Esq., of Advocates for Basic Legal Equality, counsel for plaintiffs in *Jones,* annexed hereto as Exhibit C.

17. Thus, both *Brenneman* and *Jones* resulted in visiting schedules substantially less restrictive than defendants' current schedule at HDM, particularly with regard to the availability of evening and weekend visiting for detainees whose relatives and friends are employed. This

data is certainly relevant to the issue of visiting schedules in this case, and plaintiffs respectfully request that it be considered by the Court as part of the re-opened proceedings herein.

18. Plaintiffs are very much aware that the proceedings in this case upon remand from the Court of Appeals have lasted a good deal longer than anticipated. Nonetheless, we believe that re-opening of the proceedings to the extent requested herein is essential to the protection of plaintiffs' rights. Should this Court be of the view that the necessity of terminating this proceeding promptly outweighs the considerations raised by this motion, it is respectfully requested that denial of the motion be without prejudice to this Court's reconsideration of the issues of the right to leave cells, number of visitors and visiting schedules at a plenary lawsuit on behalf of all detainees at HDM.

JOEL BERGER
JOEL BERGER

Sworn to before me this
5th day of May, 1975

STEVEN ALAN HERMAN
Notary Public
STEVEN ALAN HERMAN
Notary Public, State of New York
No. 31-4502895
Qualified in New York County
Commission Expires March 30, 1975

Exhibit A, Affidavit of Donald Goff, Annexed to Foregoing Affidavit.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3962 (M.E.L.)

AFFIDAVIT

JAMES RHEM, et al.,

Plaintiffs,

—against—

BENJAMIN J. MALCOLM, et al.,

Defendants.

DONALD GOFF, being first duly sworn, deposes and says:

1. I am Director of the Prisoners' Rights Project of the United States Commission on Civil Rights, and former General Secretary of the Correctional Association of New York.

2. I testified as an expert witness at the trial of this case on November 16, 1972.

3. In my testimony, I stated that defendants are capable of identifying through classification those detainees for whom maximum security confinement is necessary, and that once this is accomplished, most detainees can and should be confined under less than maximum security housing arrangements and procedures. I stated that cell housing is not necessary except for detainees requiring maximum security confinement, and that if cells are used for other detainees they could and should be left open for most of the day.

4. I have read this Court's Memorandum and Amended Judgment of April 23, 1975. I have also read the testimony presented to the Court on January 10, 1975 by Warden James Thomas concerning the current housing arrange-

ments and lock-out schedule at the New York City House of Detention for Men. In addition, I am personally familiar with the physical layout of the New York City House of Detention for Men, having visited the building on several occasions during my tenure with the Correctional Association.

5. In my professional opinion, the lock-out schedule sanctioned by this Court's Memorandum and Amended Judgment of April 23, 1975 results in the continued imposition of maximum security housing conditions upon all pre-trial detainees. Such a lock-in schedule does not provide any semblance of medium and minimum security housing conditions for any members of the detainee population, even though medium and minimum security detainees can be identified through classification.

6. I wish to reiterate my view, previously expressed in my testimony, that it is not necessary to house medium and minimum security prisoners in cells at all. However, if cells are used, these detainees can be accorded far greater freedom of movement than provided for under the Court's Amended Judgment and Memorandum of April 23rd. Detainees classified as medium and minimum security prisoners can be trusted not to interfere with administrative tasks at the New York City House of Detention for Men such as cleaning, feeding, and preparing fellow prisoners for court. In addition, it is not necessary to lock the cell doors of minimum security detainees at night.

7. If all detainees at the New York City House of Detention for Men continue to be confined in cells and continue to be denied the freedom of movement described above, what results is the unnecessary blanket imposition of maximum security living conditions upon each and every detainee.

8. I would be pleased to testify before this Court again to present these views in greater detail. In such testimony I would discuss why the present housing and lock-in regimen at the New York City House of Detention constitutes maximum security for all and describe the kind of housing conditions and procedures which must be provided to bring about medium and minimum security conditions. I would describe how other facilities go about providing such housing, and the various means whereby the defendants in this case could institute such housing conditions at the New York City House of Detention.

DONALD W. GOFF
DONALD GOFF

Sworn to before me this
2nd day of May, 1975

JOEL BERGER
Notary Public
JOEL BERGER
Notary Public State of New York
No. 31-5281197
Qualified in New York County
Commission Expires March 30, 1976

Exhibit B, Order Approving Visiting Hours
Annexed to Foregoing Affidavit.

Original Filed
Aug 31 1972
Clerk U.S. District Court
San Francisco

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-70 1911 AJZ

ORDER APPROVING VISITING HOURS

DANNY BRENNEMAN, et al.,

Plaintiffs,

v.

FRANK I. MADIGAN, et al.,

Defendants.

Pursuant to the ORDER SETTING HEARING ON VISITING HOURS, made and filed herein on August 31, 1972, the Court conducted a hearing in chambers on October 13, 1972, for the purpose of considering defendants' proposal concerning visiting hours, as described in Item 4.c. of defendant's RETURN TO COURT ORDER OF MAY 12, 1972, said RETURN having been filed with the Court on August 11, 1972, and the Court having considered said provision of said RETURN, and having heard the views of counsel for plaintiffs, and good cause appearing therefor,

IT IS HEREBY ORDERED that defendants' proposal concerning visiting hours, as described in Item 4.c. of said RETURN, be, and the same is hereby, approved with the exception that Sunday visiting is (and will remain) suspended by one hour from that indicated in said RETURN at page 9, line 25, and

Exhibit B.

IT IS HEREBY FURTHER ORDERED that no greater number of hours and days of visiting than as are described in said RETURN shall be required of defendants, provided, however, that nothing in this Order shall be construed as indicating that, in defendants' proposed new jail facility, the days and hours of visiting to be made available for pre-trial detainees should not be established and maintained at the highest level consistent with the reasonable operation of the institution.

Dated: October 13, 1972, and presented for signature and signed October 30, 1972.

ALFONSO J. ZIRPOLI
United States District Judge

RICHARD J. MOORE, County
Counsel of Alameda County

By KELVIN H. BOCTY, JR.
Attorneys for Defendants

Approved as to form:

Legal Aid Society of
Alameda County

By RICHARD P. BERG
Attorneys for Plaintiffs

Order Setting Hearing on Visiting Hours
Annexed to Foregoing Affidavit.

ORIGINAL
Filed
Aug 31 1972
Clerk U. S. Dist. Court
San Francisco

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIVIL ACTION No. C-70 1911 AJZ

ORDER SETTING HEARING ON VISITING HOURS

DANNY BRENNEMAN, et al.,

Plaintiffs,

v.

FRANK I. MADIGAN, et al.,

Defendants.

Pursuant to defendants' request, and good cause appearing therefor,

IT IS HEREBY ORDERED that a hearing be, and it is hereby, set to take place on Friday, October 13, 1972, at 3:00 P.M., in the courtroom of this Court, 450 Golden Gate Avenue, San Francisco, California, for the purpose of considering defendants' proposal concerning visiting hours, as described in Item 4.c. of defendants' RETURN TO COURT ORDER OF MAY 12, 1972, said Return having been filed with the Court on August 11, 19..

Dated August 31, 1972.

ALFONSO J. ZIRPOLI
United States District Judge

APPROVED AS TO FORM:

LEGAL AID SOCIETY OF ALAMEDA COUNTY

By .....
Attorneys for Plaintiff

RICHARD J. MOORE, County
Counsel of Alameda County

By KELVIN H. BOOTY, JR.
Attorneys for
Defendants

Report to the Court, Annexed to Foregoing Affidavit.

RICHARD J. MOORE
County Counsel
THOMAS J. FENNONE
Deputy County Counsel
KELVIN H. BOOTY, JR.
Deputy County Counsel
County of Alameda
1221 Oak Street
Oakland, California 94612
Telephone: 874-6541
874-7272

Attorneys for Defendants

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIVIL ACTION No. C-70 1911 AJZ

RETURN TO COURT ORDER
OF MAY 12, 1972

DANNY BRENNEMAN, et al.,

Plaintiffs,

v.

FRANK I. MADIGAN, et al.,

Defendants.

On May 12, 1972, the Court made and filed its Memorandum Opinion in the above-entitled action. At the conclusion of that Opinion, the Court ordered defendants to report to the Court on progress being made in improving the conditions of the pre-trial detainee at Santa Rita and progress being made in the proposed construction of new jail facilities. The return referred to by the Court is required to include proposed rules for the treatment of pre-trial detainees. Pursuant to that Order, defendants hereby report to the Court as follows:

Report to the Court.

1. *New Jail Facilities.*

The Board of Supervisors has authorized the purchase of an entire block in downtown Oakland to be used for the construction of the new jail facility. The Board has encumbered the sum of $1,000,000 for that purpose. The designated land is the entire city block immediately to the west of the Oakland Municipal Court-Police Administration Building; this is the block bounded by Washington, Sixth, Clay, and Seventh Streets. All of the municipal courts for the Oakland-Piedmont Judicial District are located in the existing Municipal Courts Building; some new courtrooms may be included in the new jail facility. It is possible to construct a tunnel to connect the two buildings, thus facilitating the transportation of inmates between the courts and the facility. This new facility has yet to receive the approval of the Planning Department of the City of Oakland.

It is contemplated that the new facility will be used exclusively for pre-trial detainees.

In the meantime, the County is preparing to employ a consultant to do extensive research and to make recommendations with respect to the County's corrections needs; this study will initially encompass the following two topics:

1. *Pre-arraignment*

   This would include a consolidated "I" bureau and booking operations and would study the total detention requirements for these persons who would be picked up by city or other law enforcement officers and booked into a facility pending their first

appearance in court. This phase is now handled by the individual police departments in Alameda County but common practice throughout the State is for the County to be responsible for these prisoners. Study would also determine number and location of satellite booking or reception centers.

2. *Pre-sentence*

The consultant would be required to determine the size of the jail facility needed for all persons who after arraignment are remanded to the custody of the Sheriff awaiting trial. An important phase of this study would be to determine all of the possible means of diverting persons from incarceration in the County jail while awaiting trial.

(See also the County Administrator's letter to the Board on the subject, attached hereto marked Exhibit "A," and incorporated herein by reference.) Subsequently, it is contemplated that a study will cover post-sentence and post-detention needs of the County, as follows:

1. *Post-sentence*

This would be a study of the County's need for rehabilitation and correction facilities. It would be a study of the number of people that would be reasonably sentenced to the Sheriff or some other official to handle their correction and rehabilitation. Study would include review of possibility of a regional program. It would also include

evaluation of the alternates to institutionalization such as community based treatment facilities.

2. *Post-detention*

This phase could be also entitled "Reentry into the Community" and would provide a study of the various means of integrating persons into the community and would include a review of such places as half-way houses, etc.

The County Administrator's schedule on the initial phase of the consultant project is as follows:

August 25, 1972: Issuance of request for proposals (The County Administrator has already received perhaps 50 inquiries from persons interested in doing this study. There are at least a dozen persons now known who are exceptionally well qualified to do this study.)

September 29, 1972: The proposals should have been returned to the County Administrator.

October 13, 1972: The consultant should be selected.

The consultant will probably require between four and six months to complete his study.

The County is also attempting to find as many sources for funding as possible, including the Federal government; there is attached hereto, marked Exhibit B, and by this reference incorporated herein, a letter from Supervisor Fred F. Cooper to Senator Cranston, seeking the Senator's assistance in that regard. It might be noted

that, as Supervisor Cooper indicates, the new facility will likely cost in excess of $10,000,000.

2. *Mail Regulations.*

In its Memorandum Opinion of May 12, 1972, the Court referred with approval to the mail rules adopted by the United States District Court, Northern District of Ohio, in *Jones* v. *Wittenberg*. As the Court will recall, on May 7, 1971, defendants promulgated new mail regulations to govern the mail rights of pretrial detainees; this Court approved those regulations on May 13, 1971. A copy of those approved regulations is, for convenience, attached hereto, marked Exhibit "C," and is by this reference incorporated herein as if set forth at length. Those regulations are consistent with this Court's Memorandum Opinion of May 12, 1972; in fact, it is clear that these mail regulations adopted by defendants and approved by this Court are more liberal than those stated in the *Jones* v. *Wittenberg* case (see, for example, defendants' item 3(A), wherein it is provided that letters "may be sealed by the inmate prior to mailing" when directed to certain persons.) In *Jones* v. *Wittenberg*, the United States District Court referred to the providing of free writing materials and postage when the inmate was indigent. While not mentioned in Exhibit C, defendants provide free writing materials and postage to inmates without funds.

3. *Educational, vocational, and recreational programs.*

A library will be established inside Greystone for the use of the inmate. There has been appropriated in this fiscal year the sum of $3,000 to the Sheriff to provide for this library. As indicated in the affidavit of Captain H. C.

Walker, attached hereto, marked Exhibit "D" and by this reference incorporated herein, conferences have already taken place between the County Librarian and the Sheriff's Department concerning this library. The Librarian proposes to purchase paperback books for the Greystone library (and, in addition, to provide library services to the courthouse jail, for which $2,000 has been separately appropriated). It is also possible that the county library can supply a considerable number of its surplus books to the Greystone library. These surplus books are those which may have appeared on a best seller list and were therefore purchased in quantity, but which are normally destroyed in subsequent years due to decreased usage. These books are generally in excellent condition and are perfectly usable, and would add little to the costs of the Greystone library.

The library books mentioned in the preceding paragraph will be available free of charge to the Greystone inmates. In addition to those books, books, magazines, and newspapers may be purchased by the inmates, under the conditions described in the attached affidavit of Captain Walker. Briefly, the principal requirements are that the material be acceptable for transmission in the United States mails (compare Penal Code Section 2600 (4) and A.B. 807, 1972 Legislature) and that the materials come directly from the publisher.

Within the confines of Greystone, the inmates' educational and vocational needs can only be met by means of

books, magazines, and newspapers, the availability of which is described above. The affidavit of Captain Walker indicates, it is not possible to hold educational or vocational classes within Greystone. Similarly, it is not possible to hold on-the-job training within Greystone. The only jobs available within Greystone relate to maintaining and cleaning the interior, and food service in the two dining rooms. The Greystone inmates cannot be permitted outside of Greystone for educational or vocational purposes.

Recreational needs of the Greystone inmates are met by both indoor and outdoor recreation facilities. Within the dayrooms, there is the reading matter mentioned above, television, and various games described in Captain Walker's affidavit. The out-of-door recreation is provided in the open-air courtyard, where the facilities consist of basketball and baseball, again as described by Captain Walker.

* * *

At this point defendants have an embarrassing situation to report to the Court: It was intended by defendant Sheriff, and reported to this Court in the Stipulation of Facts dated January 3, 1972, and filed herein (see paragraph 9 (d) of the Stipulation) that the six television sets in the new dayrooms would be color television sets. As this Court is aware, the construction of the new additions

to Greystone was done with great haste. Major decisions on construction were reached in numerous conferences, telephone calls, and the like, rather than by written communications between the Sheriff's Department, the Public Works Department, and the various contractors. The Public Works Department, which was in charge of dealing with the contractors, apparently was never made aware of the intentions of all other parties that the sets be color, rather than black-and-white. It was not until the installation was completed and the sets were turned on that it was discovered by the Sheriff's Department that the installed sets were black-and-white. The purchase of the television sets was made from monies in the Inmates Welfare Fund (which fund is derived from the profits of the commissary, etc.); accordingly, statements from these suppliers are not seen by the County Administrator. To replace the existing six black-and-white sets with color television sets would cost $3,300, as of current prices (August, 1972). Rather than spend the additional money to install color television, the Sheriff's Department prefers to utilize the installed black-an-white sets. In view of the Stipulation, defendants are of course compelled to report this unfortunate incident to the Court.

4. *Visiting.*

a. Visiting lists. The former rule requiring a listing by the inmates of five visitors has now been abrogated. See the affidavit of Captain Walker.

b. Age limitations. As the Court indicated, current visiting rules prohibit visiting by any person under 14 years of age. The reasons for that rule have never been previously presented to this Court, and accordingly are developed at some length in the affidavit of Captain Walker. Should the Court desire it, testimony can be presented on

the point. Some—but not all—of the reasons for the rule may change with the construction of the new facility; in any event, the matter can be reconsidered at that time.

c. Visiting hours. Defendants have carefully considered the Court's admonition that the pre-trial detainee is entitled to substantial periods of visiting each week.

There are many factors which must be borne in mind both by the jail administration and by the Court in considering visiting problems. Visitors bring money and property for the inmates; clerking staff is required to take these goods, and issue receipts.

Since Santa Rita is so far from the urban centers in Alameda County, prospective visitors usually telephone Santa Rita to discover whether or not the inmate is going to be present and available for visiting. (The inmate may not be available because of Court appearance, interview with attorneys or others, hospitalization, release, or other reasons.) Staffing is required to operate these telephones.

The operation of the facility depends upon inmate labor. The various shops at Santa Rita are in most cases outside of the fenced area, and supervision is minimal. There is attached hereto, marked Exhibit "E" and by this reference incorporated herein, a plan of the Santa Rita facility. The Court will recall the existence of the bakery, laundry, etc., to the north (and outside the fence); also to the north are the farms. To the south, in the areas designated "maintenance" and "supply" are the paint shop, wash rack, supply warehouse, and, in the maintenance building, plumbing, electrical, and carpentry shops. These shops are also

outside the fence. (The areas indicated in red will be discussed later. During weekdays, the sentenced inmates are working in these shops. Arriving visitors obviously cannot be permitted to mingle freely with inmates.

Also during weekdays, pre-trial detainees are frequently at Court. Visitors themselves, of course, are either working, in school, or similarly occupied.

Currently, visiting is on Sundays.

The preliminary calculations by the Sheriff's Department indicate that staffing to provide for new visiting periods on the five week days, for two hours in the afternoon and two hours in the evening, for pre-trial detainees only, would require in excess of 20 new deputies. The cost of salaries and fringe benefits for these deputies alone would be approximately $304,440 per year.[1] In addition, staffng for answering visitors' telephoned questions, and receiving visitors' money and property, as mentioned above, would be needed. Substantial alterations in the plant, in the parking area, in fencing, and the like, would also be required. It might be necessary to shut down the inmate work shops during the afternoons, which would have, stated simply, a disastrous effect on the operation of the facility. Accordingly, while the new facility ought to be planned to permit visiting five days per week, and perhaps even without the

---

[1] Staffing merely for the new construction and operations in Graystone has not been inexpensive. The sum is $228,644 per year. See County Administrator's letter on the subject, attached hereto marked Exhibit "F," and incorporated herein by reference. The complex scheduling used in Graystone is described in Exhibit "G."

hourly limitations set forth above, it is concluded by defendants that the full extension of daily afternoon and evening visiting as described in this paragraph cannot be done with the present facility.

Instead, defendants propose to schedule the visiting hours for the male and female pre-trial detainees as follows: Sundays, from 11:30 a.m.-2:30 p.m. (the present schedule), and Tuesdays, Wednesdays, and Thursdays, from 6:00 p.m.-8:00 p.m. The visitors' parking area is indicated in red on Exhibit "E." The plan also shows two of the three visiting areas: Little Greystone and Women's Quarters. The Greystone visiting is in Greystone itself. There is essentially no lighting whatsoever in the visitors' parking area. To have night visiting without lighting this area is obviously impossible. No one could even see—let alone protect and guide—the visitors. It is also necessary to construct fencing at several points—between Greystone and the women's visiting area, for example—and especially from Greystone through the large parking yard (called the "Grinder" since its military days) to the entry. Without the fencing, the County trucks, buses, and shops would be exposed to the visitors, resulting in possible harm to the visitors, as well as in theft and injury to the County.

It is therefore proposed to light and fence this area. The area outlined in red will be lighted to roughly the equivalent of a shopping center parking lot. This area includes the entry road and gate. There will be presented to the Board of Supervisors at its August 15, 1972, meeting the proposal for lighting and fencing. A copy of the

Board's resolution can thereafter be filed with the Court. (There is attached hereto, marked Exhibit "H," and by this reference incorporated herein a copy of the County Administrator's proposal.) The current estimated cost of lighting is $84,700. Until the electrical engineers have completed their analysis of the area, a firm cost figure is not available. The estimated cost of the new fencing is $13,640. There is also a $4,000 engineering fee. It is estimated that the time required to complete the lighting and fencing will be between seven and eight months; what is required here is the usual preparation of specifications by the engineers, solicitation of bids, awarding of contracts, actual construction, and the like. Whenever the lighting and fencing work is complete, the new visiting program can take place as indicated.

Additional staffing is required as well: the equivalent of thirteen deputies, two clerks, and one telephone operator, for three hours each on each of the three days, each week, is necessary to thus increase visiting time; the annual cost of salaries and fringe benefits is $71,688. The assumption is that extended overtime will be used on a temporary basis, until the level of usage—a completely unknown factor—has been determined. Ultimately, permanent staffing is probably required, and new personnel will be involved at much greater cost.

Defendants are prepared to present testimony on any and all aspects of visiting desired by the Court.

Report to the Court.

5. *Classification of Inmates on Intake.*

The classification system used in determining the housing of pre-trial detainees on intake has been described in the Stipulation of Facts, paragraph 2, and in Defendant's Return to the Court order of December 8, 1971, at pages 1-3; in addition, the subject was discussed by the Court itself in its Memorandum Opinion, pages 3-9. The application of this system is neither impressionistic or ad hoc; to the contrary, it is systematic. The system has been reduced to writing many times. For example, see the instruction dated August 13, 1970 (before the commencement of this litigation), a copy of which is attached hereto, marked Exhibit "I," and by this reference incorporated herein. The instruction provides that those pre-trial detainees who are initially housed in "Maximum Security" (i.e., Greystone) are described as

> Troublemakers, escape risks, prior escapes, 5150's [that is, detained persons with mental disorders; see Welfare and Institutions Code Section 5150 et seq.], suicide risks and those persons that are intoxicated (booze or drugs) still under the influence,

or those who are

> Returned from any state institution and are unsentenced.

The other pre-trial detainees, who are to be housed in "Medium Security," or Little Greystone, are described as those accused of misdemeanors, non-violent crimes, or felonies "if the man is known and the bail is not excessive." (At present, high bail is considered $20,000 and up.) At two places on this instruction the staff is admonished to

exercise reasonable discretion, considering the age of the pre-trial detainee, and the charges against him. Other factors to be considered are known past behavior; known sexual deviation; assaultive behavior; and known or suspected potential for victimization.

Further guidance is provided by the Classification Committee, which consists of the executive officer, the compound officer, and the security sergeant. This Committee can provide assistance not only in initial consultation on placement but in review of placement. The Committee weekly reviews every placement in Greystone, to see if that inmate may be moved to less secure quarters.

As indicated previously, the nature of the charges and the amount of the bail set by the magistrate are considered highly significant. So are any special Court orders on the subject of housing: See the instruction of January 7, 1972, attached hereto and marked Exhibit "J" and by this reference incorporated herein.

Such pre-trial release programs as the misdemeanant citation program and the own-recognizance program are now in operation in the County. See the report of the own-recognizance program, attached hereto, marked Exhibit "K," and by this reference incorporated herein; where the report discusses other counties, it should be considered informational only. These programs continue to alter materially the composition of the incarcerated pre-trial detainees as a group. Those left in the jail tend to be those held without bail (or otherwise not releasable);

those held on very high bail; or those who in some other way do not meet the requirements for pre-trial release. These inmates present extremely serious housing problems to the jail administration. For example, defendant Sheriff recently held in Greystone a man with $200,000 bail. This is not a normal situation, and is highly undesirable, but as there was at that time an influx of 13 motorcyclists accused of rape and 8 motorcyclists accused of murder, which was added to the normal complement of 30-40 accused murderers in the courthouse jail, there was simply no alternative to housing in Greystone. All in this group are pre-trial detainees. Obviously defendants cannot house on the Compound or indeed in Little Greystone those dangerous persons who ought to be housed, and are housed, in Greystone itself.

As the Court has already indicated in its Memorandum Opinion, at page 20, lines 17-19,

> [R]egardless of their presumed innocence, certain pre-trial detainees may be troublesome disciplinary problems. Jail personnel may segregate these inmates, but they must establish and apply appropriate standards for doing so.

Defendants intend to impose only those restrictions on the pre-trial detainees as are required to retain him and to avoid serious threat to the functioning of the institution

(cf. Memorandum Opinion, pp. 19-21). Defendants submit that the classification system makes precisely the kind of determinations with regard to inmate housing as are described by this Court.

Dated: August 11, 1972.

Respectfully submitted,
RICHARD J. MOORE, County Counsel
in and for the County of Alameda,
State of California

By KELVIN H. BOOTY, JR.,
KELVIN H. BOOTY, JR.,
Deputy County Counsel

Exhibit C, Affidavit of Joseph F. Vargyas,
Annexed to Foregoing Report.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3962

AFFIDAVIT

JAMES RHEM, et al.,

Plaintiffs,

—VS—

BENJAMIN J. MALCOLM, et al.,

Defendants.

STATE OF OHIO }
LUCAS COUNTY } ss.:

I. Joseph F. Vargyas, being duly sworn depose and say:

1. I am an attorney licensed to practice law in the State of Ohio.

2. I am one of the attorneys representing the inmates of the Lucas County Jail in the case of *Jones* v. *Wittenberg,* C-70-388, presently pending in the United States District Court for the Northern District of Ohio, Western Division.

3. I am familiar with the order entered by Hon. Don J. Young on the 30th day of July 1971.

4. I am familiar with the regulations concerning visitation which were promulgated as a result of the court order and subsequently approved by the court

Exhibit C.

5. As a result of the court order, visitation hours have been expanded and the following are the current hours allowed for visitation:

Monday-Friday 6:00-9:00 p.m.
Saturday-Sunday 12:30-7:30 p.m.

6. Various cellblocks are assigned certain hours during the regularly scheduled visitation hours.

7. All inmates are permitted two hours of visitation during the week night hours and one hour on Saturday and one hour on Sunday.

8. Attached to this affidavit and marked as Exhibit A is the current visitation schedule employed at the Lucas County Jail.

JOSEPH F. VARGYAS
Joseph F. Vargyas

Sworn to before me and subscribed in my presence this 29th day of April 1975.

BARBARA G. RICHARDSON
Notary Public
(Illegible)

Visitation Schedule, Annexed to Foregoing Report.

EXHIBIT A

LUCAS COUNTY JAIL

VISITATION SCHEDULE

MONDAY THROUGH FRIDAY VISITATION HOURS

FLOORS	MONDAY FROM	MONDAY TO	TUESDAY FROM	TUESDAY TO	WEDNESDAY FROM	WEDNESDAY TO	THURSDAY FROM	THURSDAY TO	FRIDAY FROM	FRIDAY TO
1—BIG	7:00PM	7:50PM			7:00PM	7:50PM				
2—BIG			7:00PM	7:50PM			7:00PM	7:50PM		
3—BIG					6:00PM	6:50PM			7:00PM	7:50PM
1—SR	6:00PM	6:50PM							6:00PM	6:50PM
2—SR			6:00PM	6:50PM					6:00PM	6:50PM
2—SL	6:00PM	6:50PM					6:00PM	6:50PM		
3—SR			6:00PM	6:50PM					6:00PM	6:50PM
WOMEN			8:00PM	8:50PM			8:00PM	8:50PM		

SATURDAY VISITATION HOURS

FLOORS	FIRST & FIFTH SATURDAYS FROM	FIRST & FIFTH SATURDAYS TO	SECOND SATURDAY FROM	SECOND SATURDAY TO	THIRD SATURDAY FROM	THIRD SATURDAY TO	FOURTH SATURDAY FROM	FOURTH SATURDAY TO
1—BIG	5:30PM	6:20PM	2:30PM	3:20PM	12:30PM	1:20PM	5:30PM	6:20PM
2—BIG	12:30PM	1:20PM	5:30PM	6:20PM	2:30PM	3:20PM	12:30PM	1:20PM
3—BIG	2:30PM	3:20PM	12:30PM	1:20PM	5:30PM	6:20PM	2:30PM	3:20PM
1—SR	1:30PM	2:20PM	6:30PM	7:20PM	3:30PM	4:20PM	1:30PM	2:20PM
2—SR	1:30PM	2:20PM	6:30PM	7:20PM	3:30PM	4:20PM	1:30PM	2:20PM
2—SL	6:30PM	7:20PM	3:30PM	4:20PM	1:30PM	2:20PM	6:30PM	7:20PM
3—SR	6:30PM	7:20PM	3:30PM	4:20PM	1:30PM	2:20PM	6:30PM	7:20PM
WOMEN	3:30PM	4:20PM	1:30PM	3:20PM	6:30PM	7:20PM	3:30PM	4:20PM

Visitation Schedule.

SUNDAY VISITATION HOURS

	FIRST & FIFTH SUNDAYS		SECOND SUNDAY		THIRD SUNDAY		FOURTH SUNDAY	
FLOORS	FROM	TO	FROM	TO	FROM	TO	FROM	TO
1—BIG	2:30PM	3:20PM	12:30PM	1:20PM	5:30PM	6:20PM	2:30PM	3:20PM
2—BIG	5:30PM	6:20PM	2:30PM	3:20PM	12:30PM	1:20PM	5:30PM	6:20PM
3—BIG	12:30PM	1:20PM	5:30PM	6:20PM	2:30PM	3:20PM	12:30PM	1:20PM
1—SR	6:30PM	7:20PM	3:30PM	4:20PM	1:30PM	2:20PM	6:30PM	7:20PM
2—SR	6:30PM	7:20PM	3:30PM	4:20PM	1:30PM	2:20PM	6:30PM	7:20PM
2—SL	3:30PM	4:20PM	1:30PM	2:20PM	6:30PM	7:20PM	3:30PM	4:20PM
WOMEN	1:30PM	2:20PM	6:30PM	7:20PM	3:30PM	4:20PM	1:30PM	2:20PM

3/10/75

Defendant's Notice of Appeal.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. 70 Civ. 3962
M. E. L.

NOTICE OF APPEAL

JAMES RHEM, ROBERT FREELY, LEO ROBINSON, and EUGENE NIXON, individually and on behalf of all other persons similarly situated,

Plaintiffs,

—against—

BENJAMIN J. MALCOLM, Commissioner of Correction for the City of New York; ARTHUR RUBIN, Warden, Manhattan House of Detention for Men; ABRAHAM D. BEAME, Mayor, City of New York; PETER PREISER, Commissioner of Correction of the State of New York; HUGH CAREY, Governor, State of New York; and OWEN MCGIVERN, Presiding Justice, New York State Supreme Court, Appellate Division, First Department, individually and in their official capacities,

Defendants.

SIRS:

NOTICE IS HEREBY GIVEN that Benjamin J. Malcolm, Arthur Rubin and Abraham D. Beame hereby appeal to the United States Court of Appeals for the Second Circuit from the judgment dated and entered herein on or about April 23, 1975, and this appeal is taken from each and every part of said judgment as well as from the whole thereof.

Dated: New York, N. Y.
June 3, 1975

Yours, etc.,

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Municipal Defts.
Municipal Building
New York, N. Y. 10007

By.....
Carl Sanders

Defendant's Notice of Appeal.

To:

William E. Hellerstein
Joel Berger
Steven A. Herman
The Legal Aid Society
15 Park Row
New York, N. Y. 10038

Louis J. Lefkowitz
Attorney-General
Attorney for State Defendants
Two World Trade Center
New York, N. Y. 10047
Attn: David Berman, Esq.

Memorandum of District Court of 6-26-75.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3962

MEMORANDUM

JAMES RHEM, ROBERT FREELY, LEO ROBINSON, and EUGENE NIXON, individually and on behalf of all other persons similarly situated,

Plaintiffs,

—against—

BENJAMIN J. MALCOLM, Commissioner of Correction for the City of New York; ARTHUR RUBIN, Warden, Manhattan House of Detention for Men; ABRAHAM D. BEAME, Mayor, City of New York; PETER PREISER, Commissioner of Correction of the State of New York; HUGH CAREY, Governor, State of New York; and OWEN MCGIVERN, Presiding Justice, New York State Supreme Court, Appellate Division, First Department, individually and in their official capacities,

Defendants.

APPEARANCES:

THE LEGAL AID SOCIETY
15 Park Row
New York, New York 10038
Attorneys for Plaintiffs
Of Counsel: WILLIAM E. HELLERSTEIN, ESQ.
JOEL BERGER, ESQ.
STEVEN A. HERMAN, ESQ.

W. BERNARD RICHLAND, ESQ.
Corporation Counsel
Municipal Building
New York, New York 10007
Attorneys for Defendants BENJAMIN J. MALCOLM, ARTHUR RUBIN and ABRAHAM D. BEAME
Of Counsel: DONALD TOBIAS, ESQ.
Assistant Corporation Counsel

LOUIS J. LEFKOWITZ, ESQ.
Attorney General of the State of New York
World Trade Center II
New York, New York 10047
Attorneys for Defendants PETER PREISER, HUGH CAREY and OWEN MCGIVERN
Of Counsel: DAVID BERMAN, ESQ.

Memorandum.

LASKER, D.J.

Plaintiffs' motion to reopen the hearings and the amended judgment of April 23, 1975 is denied. To grant the motion would convert this suit, originally brought to challenge conditions at the Tombs on behalf of persons then inmates at the Tombs, into a plenary suit as to conditions at the House of Detention for Men at Riker's Island (HDM).

Following a determination by the Commissioner of Corrections in November, 1974 to close the Tombs and transfer its remaining inmates to HDM, plaintiffs argued that they were entitled to the same relief at HDM that they would have received at the Tombs. We agreed and scheduled hearings to receive evidence as to conditions at HDM. At the outset of these hearings the City argued that plaintiffs' claims for relief at HDM could only be pressed in a new lawsuit replete with full discovery and a trial de novo. As stated in our memorandum of February 20, 1974, we then disagreed with the position of the City because, since this case affected only persons transferred from the Tombs to HDM, evidence presented at the hearings related solely to the differences in conditions between the two institutions. We pointed out that such differences were obviously fully known to the City defendants who were the very administrators of the institutions and that, therefore, the City's

argument that discovery and a plenary trial was necessary was disingenuous.

However, the material which plaintiffs seek by their present motion to put before the court is of a different character. Plaintiffs do not now propose to present data relating to differences between HDM and the Tombs but rather to create an affirmative record that (1) cells can be rearranged at the HDM so as to afford detainees who do not require maximum security custody greater freedom to leave their cells; (2) present population counts and cleaning of the institution can be done in less time than contended by the City; (3) visitation schedules can be improved at HDM because they are allegedly more flexible at other institutions. They also contend that "assuming *arguendo* that defendants were really unable to provide less restrictive housing to the vast majority of plaintiffs within the current structure at HDM, that structure would have to be altered or other non-maximum security facilities developed." (See Reply Affidavit of Joel Berger in support of the motion.)

These important issues raise extensive questions of law and fact which should not be determined in a case which is before us on remand from the Court of Appeals and for which a final judgment has been filed. Moreover, because the issues plaintiffs raise by their present motion may relate to conditions at institutions other than HDM, the

should be litigated in a plenary lawsuit which will afford the defendants the rights of discovery necessary to present their case properly.

Plaintiffs request that if the motion is denied it be without prejudice to this court's reconsideration of the issues in question in a plenary lawsuit on behalf of all detainees at HDM. As we have earlier stated, this case has been prosecuted only by a plaintiff class of persons who were inmates at the Manhattan House of Detention (Tombs) at the time the suit was instituted. No decision in this litigation has ever had the effect or been intended to have the effect of adjudicating the rights of any persons at the House of Detention for Men except members of the plaintiff class in the instant suit. Accordingly, our denial of the motion as a matter of law is without prejudice to the commencement of any litigation on behalf of those detainees at HDM who are not members of the plaintiff class in the present case.

Finally, in deciding this motion, we are mindful of the instruction of the Court of Appeals that "The District Judge should not allow another trial on the merits of plaintiffs' claim or countenance any significant delay in fashioning another decree. Four years after ugly riots caused by conditions at the Tombs, the time has come to

end this litigation." *Rhem* v. *Malcolm,* 507 F.2d 333, 341 (2d Cir. 1974).[1]

For the reasons set forth above, plaintiffs' motion is denied.

It is so ordered.

Dated: New York, New York
June 26, 1975.

MORRIS F. LASKER,
U.S.D.J.

FOOTNOTE

[1] The National Prison Project—American Civil Liberties Union has moved for permission to file a memorandum in support of plaintiffs' motion to reopen the hearings. The motion is granted. The decision we have reached has been made after consideration of the material submitted by the Amicus.

JAMES FINN, ROBERT FREELY, LEO ROBINSON and EUGENE NIXON, et al.,

70 Civ. 3962

vs.

BENJAMIN J. MALCOLM, et al.

Defendants.

New York, December 18,20, 1974

Before:

HON. MORRIS E. LASKER,
District Judge.

STENOGRAPHER'S MINUTES

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U.S. DISTRICT COURT
S.D. OF N.Y.

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For the reasons set forth above, plaintiffs' motion is denied.

It is so ordered.

Dated: New York, New York
June 26, 1975.

MORRIS F. LASKER,
U.S.D.J.

FOOTNOTE

[1] The National Prison Project—American Civil Liberties Union has moved for permission to file a memorandum in support of plaintiffs' motion to reopen the hearings. The motion is granted. The decision we have reached has been made after consideration of the material submitted by the Amicus.

JAMES FHEM, ROBERT FREELY, LEO ROBINSON and EUGENE NIXON, et al.,

70 Civ. 3962

vs.

BENJAMIN J. MALCOLM, et al.

Defendants.

New York, December 18, 20, 1974

Before:

HON. MORRIS E. LASKER,
District Judge.

STENOGRAPHER'S MINUTES

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

JAMES RHEM, ROBERT FREELY, LEO ROBINSON and EUGENE NIXON, individually and on behalf of all other persons similarly situated,

Plaintiffs,

- v s -

BENJAMIN J. MALCOLM, Commissioner of Correction for the City of New York; ARTHUR RUBIN, Warden, Manhattan House of Detention for Men; ABRAHAM D. BEAME, Mayor, City of New York; PETER PREISER, Commissioner of Corrections of the State of New York and OWEN McGIVERN, Presiding Justice, New York State Supreme Court, Appellate Division,

Defendants.

70 Civ. 3962

----------x

B e f o r e :

HON. MORRIS E. LASKER,
District Judge.

New York, N. Y.
December 18, 1974 - 9:30 a.m.

A p p e a r a n c e s :

JOEL BERGER, ESQ.,
STEVEN HERMAN, ESQ.,
Attorneys for the Plaintiffs.

DONALD J. TOBIAS, ESQ.,
Corporation Counsel.

jqsr

Appearances: [continued]

ALSO PRESENT:

JAMES A. THOMAS, Warden, New York City House of Detention.

WILLIAM RITHOLTZ, Department of Corrections,

JOSEPH D'ELIA, ESQ., Director of Operations,
Department of Corrections.

THE COURT: I have read the papers submitted by both sides, that is proposed orders and memoranda supporting those proposed orders.

The first question to be determined is whether the Court has jurisdiction to impose any conditions with regard to the proposed transfer of detainees from the Tombs to the New York City House of Detention for Men. From now on I will refer to that as Rikers Island.

I have concluded that the Court does have jurisdiction to set conditions on the transfer of those detainees for two reasons. First of all, at least at the moment the City is asking the Court to allow it to keep the Tombs open until the 31st of December which it would have no right to do except with the permission of the Court since the City does not propose to improve the conditions of the Tombs as required by the Court's previous order which was affirmed by the Court of Appeals.

The second reason is that even if the City were not requesting the right to keep the Tombs open I agree with the plaintiffs that certain aspects, certain significant aspects of the relief afforded were personal and did not literally depend on the residents of the plaintiffs in the Tombs.

By that I mean that I found that detainees, as a

matter of constitutional law, were entitled to certain rights and they would clearly be entitled to the same rights whether they were housed in the Tombs or in Rikers Island. The matter on which I believe that the City may be justified, and the question remains what the scope of that justification is, is the degree to which further factual information might be required by the Court to act on some of the matters that have been raised by the plaintiffs.

My suggestion is that we go through the items that are under discussion, specifically those items which the plaintiffs propose should be included in the order to determine which of them might require further factual elucidation and then I will hear counsel on both sides on those points.

Let's take a look at the plaintiffs' proposed order as the table of contents for such a discussion.

I may state in passing that I was struck in my thinking by a quotation contained in the proposed order of the affidavit of Mr. Tobias, which in Paragraph 5 quotes the Court of Appeals of this Circuit in its opinion which affirmed my January 1974 decision as stating that the choice of remedy by this Court in accordance with the Court of Appeals ferments, "has tremendous implications not only for the City but also for pre-trial detainees who may find

themselves dispersed to facilities far away from families, friends, and attorneys." And I believe that although the Court of Appeals did not necessarily foresee the precise state of affairs which has occurred, namely, that it was the City which made the decision to close the Tombs rather than the Court, that the Court of Appeals has instructed me that it is an obligation of this Court to assure that whatever is the outcome of this litigation the rights of the pre-trial detainee plaintiffs are to be protected, of course, within the limits, first, of what has been determined so far and, secondly, only on the basis of factual information, if further factual information is necessary.

Having made those preliminary remarks I suggest we look at the proposed order of the plaintiffs.

Number One has to do with classification. I am prepared to hear argument as to why a conclusion that a classification system was feasible at the Tombs would not automatically apply to the other City detention facilities.

Mr. Tobias?

MR. TOBIAS: Your Honor, in deciding that that classification was mandated at the Tombs, your Honor examined the facilities at the institution. Your Honor came to the conclusion that that was a completely maximum security institution and you felt that a classification system would

jqsr

insure some people, if not all, of getting less restrictive forms of incarceration than they were getting at that time. I don't think it's possible to come to this type of conclusion without examining the full scope of conditions.

THE COURT: Let's get down to brass tacks. What do I have to find out to determine that?

MR. TOBIAS: Maximum security is just a label.

THE COURT: Look, Mr. Tobias, I am going to cut through all the balogna into this case now and lay it on the line.

I decided, as a matter of constitutional law, and I have been confirmed by the second highest Court in the land, and I don't think anybody thinks that the Supreme Court would have overruled this, that detainees may not be held under conditions more restrictive than necessary. I didn't decide that because it was maximum security there had to be a classification. It happened to be maximum security and I said you can't hold people in tougher conditions than they have to be held in.

Insofar as I have observed the situation at Rikers Island, although much more pleasant esthetically and much less burdensome and shocking, and so forth, without any question on the whole, it comes very close, it seemed to me, to being the same kind of holding as the Tombs. But, in

any event, if everybody is free to roam around, and that is what you are telling me, then we don't need a classification system. As I understand, they are locked in the same number of hours per day. There are long tiers of cells that once you are in them they are not all that different from the Tombs except that you can see out which is a big difference.

What are you trying to tell me that is the big difference?

MR. TOBIAS: Your Honor, when you observe different institutions it's possible to come to different conclusions with respect to the type of confinement that is necessary. I don't see how it's possible to come to conclusions that some inmates need less restrictive forms of incarceration without examining the institution.

THE COURT: That isn't the theory. The theory is that all detainees are entitled to the least restrictive except where you show that they are required to have more.

MR. TOBIAS: We want to be able to show that the present form of incarceration --

THE COURT: Is suitable for everybody there?

MR. TOBIAS: Yes.

THE COURT: Tell me why is it?

MR. TOBIAS: We were very, very successful in

doing just that in the Velvano case. In that case the plaintiff said that there was something called excessive confinement. They introduced people who stated that there could be classification and that this could, in fact, result in having greater lock-out time. We maintained that under the circumstances in the Brooklyn and Queens Houses of Detention the lock-out scheme was suitable for everybody in the institution and we were sustained by Judge Judd on that point.

THE COURT: How long would it take for us to have such a hearing at Rikers Island?

MR. TOBIAS: It's not as simple as that. There were experts brought in. There was six days of testimony on this and one other issue. I feel that as a matter of due process of law we are entitled to apprise this Court or any other Court as to the conditions at Rikers Island.

THE COURT: What are the conditions that you think indicate that no classification -- and that would mean everybody there is being held, in your opinion, under the least restrictive conditions.

MR. TOBIAS: That is true, your Honor. With respect to certain of the issues that are --

THE COURT: We are talking about whether there ought to be a classification system. The purpose of the classifi-

cation system is to determine who needs to be held under more stringent conditions than other people. Unless everybody is held under the least restrictive conditions then at least the concept of a classification system is viable.

I am not saying what the classification system ought to be at Rikers. But the plaintiffs say there should be a classification system.

MR. TOBIAS: If you have a classification system, from this order, I infer anyway, it means that a good percentage of people are going to be free to roam around all day. That simply can't be done. We contend that the lock-out scheme which is really tied in with classification as is contact visits, we feel that the circumstances at the House of Detention for Men would be warranted regardless of any eventual classification of inmates.

THE COURT: As distinct from the Tombs?

MR. TOBIAS: Very possibly.

THE COURT: Why? What is the difference? I am sure you wouldn't be happy with the necessity of imposing the order but the Court of Appeals said you should.

MR. TOBIAS: I believe that you examined the recreational opportunities available at the Tombs. You examined --

THE COURT: I will examine anything you want at Rikers Island with the requests of the plaintiffs in mind. That is no problem at all. Of course, I will go out there and look at anything you want and hear anything you want. Why it should take six days is crazy. I don't see why I can't hear in a day what has to be heard on this subject.

MR. TOBIAS: I would like some expert evaluation on this.

THE COURT: You have already got it. I will read everything you have. Or is that just the Brooklyn House of Detention and Queens?

MR. TOBIAS: Yes. We maintain you have to evaluate every institution.

THE COURT: We will within the next sixty days. Unless I hear something more persuasive than that this order is to be signed and within the sixty days I will hear anything you want and you can persuade me to the contrary. I feel the City abused the Court's patience in the past by stalling and stalling and stalling. It misled the Court into believing that it was going to do what the Court asked them to do and told us that it might keep the Tombs open then closed the Tombs, then fooled around with the Court of Appeals, and then finally comes to us this way.

The Court of Appeals has told me not to play

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games any longer. I am going to read into the record what the Court of Appeals has said on that point.

After specifying the possible actions which this Court might take and indicating that the parties should have a further opportunity promptly to offer suggestions for an order, the Court of Appeals has stated in its opinion, "However, the District Judge should not allow another trial on the merits of plaintiffs' claims or countenance any significant delay in fashioning another decree."

In addition, the Court of Appeals added, "Before closing this opinion a further word may be appropriate. One does not get the impression, from the record, of defendants straining in every way to comply with the District Court's directions. The foot dragging is, of course, understandable. The financial roles of the City of New York are obvious to all who live or work here including Federal Judges", and I must say that I thoroughly understand those roles.

And on the agenda of City priorities which include supply of such essential services as police and fire protection, provision of welfare, care of the ill, collection of garbage and maintenance of the transit system, it is not surprising that the housing of those confined in jail is

not at the top of the list. But pre-trial detainees are people, not outcasts, who are presumed to be innocent of any crime and who have rights guaranteed by the Constituion as do we all.

When a District Court is presented with a claim of violation of those rights its proper function is to decide the case before it, whatever sympathy it may have for those who must manage a great metropolitis beset by grievous problems.

I think then what we should do, except for those subjects with which I agree with you -- that even the entry of an order would be inappropriate without my hearing something further -- is to enter the order with a suitable amount of time allowed for the carrying out of the order and have an immediate hearing before me for whatever you wish to present to me as to why that order ought to be modified. At least that is my reaction to the classification system.

MR. TOBIAS: May I say one thing?

THE COURT: I am talking about Paragraph 1 at the moment.

MR. TOBIAS: I understand. Still it creates the inference, even more than an inference, that the House of Detention for Men at Rikers Island is an unconstituticnal

facility. That hasn't been proven. This doesn't allow -- we are in a sense starting a lawsuit from the opposite end. Usually lawsuits start with summons, complaints, discovery, trial, pleadings, all that. Here we are starting from an order. I feel that this violates --

THE COURT: I am not sure I agree with you. Clearly that can be remedied and easily remedied by the institution of such a suit from the other end, which would clearly be a related case.

MR. TOBIAS: That would be the appropriate course of action.

THE COURT: Are plaintiffs' counsel considering anything of that sort?

MR. BERGER: Of course we are, your Honor.

THE COURT: It doesn't mean that such a procedural consideration should be permitted to delay, in any significant way, of the relief that I am told by the Court of Appeals to give.

MR. TOBIAS: I am not trying to delay. I understand what my predecessors did.

THE COURT: I want to say that I believe -- at least since the case was argued in the Court of Appeals -- in all the matters you have had before me that you have personally been very cooperative and have presented the

position of the City in a much more competent fashion, without my reflecting on any individuals who are not here in this room, than any other person who has represented the City. I am always prepared to assume that people act in good faith. Believe me, I was prepared to assume that for a long time with the City officials until I reluctantly had to conclude to the contrary. This is certainly not a personal discussion as to Warden Thomas whose testimony struck me as very straightforward, or statements in the dealings I have had with him or Mr. D'Elta, although I may disagree with some of his conclusions. This is a legal question.

MR. TOBIAS: I believe that when your original order was promulgated and when the Court of Appeals sustained the order what they were basically sustaining was the utilization of the least restrictive means test.

THE COURT: They were stating that was a constitutional requirement.

MR. TOBIAS: I agree, your Honor. The point is when you take a test you can't take the findings of fact in one institution. You can utilize the test in another institution.

THE COURT: That is right.

MR. TOBIAS: But you have to go through the whole

fact finding process. This order could, by its very nature, only affect a couple of hundred people in H.D.M. If the plaintiffs are planning to try to effectuate the rest of the conditions for the rest of the individuals in the interest of judicial economy, they would be better off instituting a plenary lawsuit.

THE COURT: What I am saying is this: I have by now acquired some body of experience. I don't pretend to be an expert but I have some body of experience. At least I know from what my thinking is based on and I believe I know what the Court of Appeals had in mind when it affirmed what I wrote. I do not mean to say that any two institutions are precisely the same. Nor do I mean to say that because I have visited Rikers Island once, although I did get a pretty good tour by virtue of the courtesy of the warden, that I pretend to know everything about it. What I do mean to say is it does not seem to me that I personally, as the trier of whatever facts you wish to put before me, would have to start from scratch in learning the things that you are telling me. I know something about these facilities by now and I can form conclusions much quicker and I do not intend to write another 120 page opinion about whatever comes up.

MR. TOBIAS: I understand. However, I would say

just as an example, the example I picked out in my brief, and it was a short memorandum, was your dealing with the issue of contact visits. You evaluated the defendant's defense. You stated that our defense of security, although it could have been a valid defense, was not in the case of the Tombs. You felt we, in effect, didn't meet this balancing process. We might possibly be able to meet it at the House of Detention for Men.

THE COURT: I agree with you that you might theoretically. I would say this from what I know of the two institutions and the bold facts that distinguished them is that Rikers Island is on an island. I felt like I was entering a Nazi concentration camp when I had to try to get in there even though I am a Federal Judge. It's a little hard for me to believe that the problems of security are tougher for the Commissioner or the warden on Rikers Island than they were at the Tombs. The very argument at the Tombs was that anybody could slip out the front door and mingle in with the population.

So how long can it take for me to determine that question?

MR. TOBIAS: What you say may or may not be true. There may be some factors --

THE COURT: What would there be? Let's deal with

realities.

MR. TOBIAS: This would be something that has to be developed and it could be developed. A trial is the perfect place to do it.

THE COURT: It has to be developed pronto.

MR. BERGER: For any trial beyond a tour of the institution or for any additional fact finding, whether in a new case or in the relief hearing, we have certain issues here as to which we have res judicata already, and the City would have to come up with a written offer of proof as to what they plan to show. We are not going to go through expert testimony again.

THE COURT: I will ask for that, Mr. Tobias, not at this minute, of course. At the moment we are discussing and analyzing the legal posture of this situation. I quite agree with Mr. Berger, even if he didn't suggest it, that before I decide what to do I ought to know what it is you would like to prove to me.

By that I don't just mean the general theory but who you would call and what you expect them to say. I think we ought to test this whole situation as quickly as possible. I don't mean to be rash. I don't mean to over react to what the Court of Appeals has stated. I think it's made clear. It is true that the Court of Appeals

contemplated that the Tombs probably would be kept open one way or another to some extent, at least that is the way I read the opinion, and that they felt that speed was necessary so that those who were in the Tombs should no longer be deprived of their rights.

On the other hand, I don't think there is any reason to believe that they would have felt differently than I do, that if the people who are in the Tombs are going to be moved out of the Tombs that with regard to those rights which are transferable, so to speak, those rights should be deferred for any period of time. So my feeling is that as a general proposition I should order what I believe is right with an indication of how long we will have to accomplish these things.

I should set up arrangements for an immediate hearing of whatever I consider reasonable for you to put before me and I should reach conclusions as to whether the order should be modified as a result of those hearings, and if so modify it, and if not modify it and allow you to appeal if you wish immediately to the Court of Appeals so it can decide whether this is the right way to proceed.

MR. TOBIAS: Don't you think that this, in fact, places the burden on us to show it's not an unconstitutional facility? I think it's an improper shifting of burden.

THE COURT: I will consider that.

MR. TOBIAS: The plaintiffs in a civil case do have the burden of proof. We are dealing with a different facility although the same test legally has to be applied. The burden of proof doesn't change.

THE COURT: What I am saying, in effect, is that at the present posture I believe that the plaintiffs have gone very far towards sustaining their burden of proof. I haven't heard anything that you have told me at this table which persuades me that there is any less reason for a classification system to exist at Rikers Island. I think they have at least established a prima facie case on those things.

MR. TOBIAS: There have been no pleadings.

THE COURT: Come on. There have been no pleadings and I am ruling there do not need to be pleadings with regard to the people at the Tombs. They are saying to me, "Judge, give us our rights at Rikers Island if we are going to be moved there."

I agree that they are entitled to the protection of those rights subject only to my determination of whatever fact distinctions there are between Rikers Island and the Tombs which might affect those rights and I am ruling, as a matter of law, that pleadings are not necessary for

that purpose.

MR. BERGER: As I see it, there are really only two areas in which there might be significant differences between Rikers Island and the Tombs that would require any fact finding by this Court. One is obviously the physical structure of the place on Rikers Island and, to some extent, Sing Sing also is involved here. The other would be the programs of those institutions. Certainly we don't have to retry the expert testimony. We don't have to show the contact visits.

THE COURT: Of course not.

MR. BERGER: As to the physical structure most of that can be taken care of by a tour. If there is anything else better said than viewed I understand the necessity for a hearing on that.

As to programs there has already been a substantial hearing before your Honor in a related matter in which Mr. Tobias did an effective job as to just how limited the programs for general population are at that very institution. I don't even think we have to retry that case.

THE COURT: I don't understand what the programs issue is. What would that affect?

MR. BERGER: He feels it affects the totality of the conditions. It doesn't really go to anything in our

proposal.

THE COURT: Programs has nothing to do with access of visitors or contact of visitors or visiting schedule. The visiting schedule, for example, I can understand would be affected by conditions at Rikers Island as distinct from the Tombs.

Discipline has certainly nothing to do with that.

MR. TOBIAS: You see the way we have treated that.

THE COURT: Correspondence has nothing to do with that.

MR. TOBIAS: It does in a way. There was one decreedal paragraph included in the proposed judgment which I would say would, in fact, under the terms of your order, be further examination, that is the receiving of books and periodicals straight from the publisher.

THE COURT: Why?

MR. TOBIAS: I believe in your order you stated that you could see the possible security problems but you felt in view of the fact that the Tombs didn't have the requisite library facilities or requisite magazines of interest to the particular inmates that you would fashion --

THE COURT: You can take fifteen minutes if you want. Frankly, my opinion I believe was based on much broader considerations of freedom of speech, freedom of the

press. It pointed out that Justice Holmes said that curbing of the rights to read was a curbing of the First Amendment. But even assuming that you are correct, how long can it take for me to look at your library facilities?

MR. TOBIAS: It's a limited issue. I submit that the other issues are more substantial.

THE COURT: I will come out next week and see whatever you want me to see. But I don't approach the subject -- and I don't want to leave you with any illusions on the subject -- as requiring, insofar as the people in the Tombs are concerned, a new trial de novo or new pleadings or necessarily imposing on the plaintiffs the burden of proving things from scratch. I have made enough observations here to indicate that I think that I can start finding, in fact, myself at a much higher level of knowledge and certainly can reach conclusions much quicker than I could when I first came here as a neophyte and studied these subjects.

Furthermore, the rules of law are established for us now by the Court of Appeals' opinion.

You don't even think that?

MR. TOBIAS: I feel only the tests.

THE COURT: What is a rule of law besides that?

MR. TOBIAS: You have to apply them to a completely

different institution.

THE COURT: I heard that. What I mean is that it is agreed that such things as lock-in time and optional loc-in are matters of constitutional magnitude. There are none of my findings to that effect to which the Court of Appeals has disagreed with. They haven't said that is nothing for a District Court to worry about. They haven't said that contact visits are things the District Court should disregard.

MR. TOBIAS: The plaintiffs should have the burden of proving that the optional lock-outs are unconstitutional.

THE COURT: You heard me say I disagree with you and you stated it on the record and you are protected on an appeal to that extent. We do have a few minutes more. I am conducting a trial this morning. I was going to suggest this: I am not trying the case on Friday. I will have some free time on Friday. I really think we are essentially faced here with legal questions and I am very glad that you have your colleagues and the warden here and they are welcome to return if they want to on Friday. I don't think we need them.

I think we are dealing with lawyers' matters. What I think you ought to do, Mr. Tobias, is by tomorrow

prepare in writing for me and for the defense counsel a statement of the items which you believe that the Court should receive proof on in regard to the proposed requests for relief in the plaintiffs' order. You don't necessarily need to name witnesses but, if you can, I would appreciate the kind of witnesses that you would have in mind. I would then want the plaintiffs' counsel to be prepared on Friday to respond to such items. I will now make a date to go out to enjoy the hospitality of the warden next week after Christmas.

I hope he is not going down to the Bahamas for the holidays. I am anxious to learn every damn thing I can about your institution which, by the way, warden, I consider to reflect signs of excellent management and leadership. You didn't build the place, and the people who were in the Tombs in recent years, in my opinion, were not responsible for what I found there. You didn't build the place. But that is neither here nor there. That doesn't decide the question of whether, as a matter of law, somebody has a right to shake hands with their wife or give them a kiss when they come to visit them.

MR. BERGER: Can I make one request to the Court. I feel that we are occasionally shooting in the dark here because we haven't been inside the institution.

THE COURT: At Rikers?

MR. BERGER: Yes.

THE COURT: It's great, you will love it.

MR. BERGER: Customarily lawyers usually investigate the facts first before presenting them to the Court. I was wondering in this instance whether Warden Thomas wouldn't mind if we went out there tomorrow and looked around.

THE COURT: I would request you allow that. You have these characters there all the time anyway.

MR. BERGER: We can show you the salient features.

THE COURT: Of course, your colleagues know the place very well.

MR. TOBIAS: May I state my thinking in the case and I would like to explain the way I proceeded and what I anticipated.

THE COURT: All right.

MR. TOBIAS: As you know, both Courts have instructed the City if they did not fix up the Tombs to close it down, in effect. In this transfer, by virtue of the Commissioner's affidavit and my own affidavit, and the order itself, I felt that we indicated that we would be interested in the concessions that we have made in insuring that this Court knew that the people upon transfer were not

going to be taken to a place that was uninhabitable.

THE COURT: Let me comment on that.

First of all, I have already said that there are certainly aspects of Rikers Island which are infinitely better. And I stressed the word infinitely better, than the Tombs. I am not going to be a bull in a China shop either. I don't regard these things as questions of sheer personal opinion. We have developed a body of law here by now which indicates that detainees who are under our law are considered to be people who are innocent are entitled to be held under conditions no tougher than necessary to require them to appear for trial.

We all know that most of these people are there because they are poor and they are unable to put up the dough that anybody else at this table would be able to put up to get out and that, in our modern society, makes a difference. We no longer stand on technicalities about these things.

If I were in the warden's shoes I certainly understand that I would not want to introduce certain procedures which might make it a lot harder for me to be sure whether narcotics came into the place or whether somebody could jump in the water and swim across, although I don't see how they could, because he has somebody on top

of him who is going to give him hell or the press is going to give the City hell if anybody escapes. I understand all of those things. I also understand and have always felt that Commissioner Malcolm was a forward looking penalogist, that he didn't like the situation any more than I did.

He calls it an administrative decision to close it down. Stanley Brooks says it's because the Courts said you have to close it down. I don't think it's important one way or the other. I do understand that you and the Commissioner and everybody at this table are making good faith efforts to do what, in your own lights, you consider to be respectful observance of the Court's order.

I will say this: The word concessions I think is poorly used. I don't think that anything that the City is proposing to do, for example, such as to institute the same disciplinary proceedings at Rikers Island as were ordered at the Tombs really constitutes a concession because you, as a lawyer, know that that means that the Court for the Second Circuit has said that is the law. At least it's the law to the extent we have actually determined it subject to the one thing still pending.

MR. TOBIAS: Your Honor, in view of the statements that the Commissioner made in his affidavit and I made,

I felt that this Court, being assured that the people were not being transferred to an uninhabitable institution, I felt we could effectuate the transfer and plaintiffs could institute their lawsuit for the whole institution, not just a fifth of it or even less than that.

I just feel that not only is there a due process of violation, the defendants due process here, but there is also a question of judicial economy.

THE COURT: Would you agree that such a suit, if it were instituted, would constitute a related case?

MR. TOBIAS: No, I would not. Absolutely not. I think the institutions are different institutions.

MR. BERGER: Would you say such a new case would have to try contact visits entirely including psychiatric tests?

MR. TOBIAS: With the same standards as formulated by the Second Circuit, absolutely.

MR. BERGER: Within those standards you would say we have to once again point to a psychiatrist, to say this booth out here is just as unconfortable as this booth in the Tombs, is that what you are saying?

MR. TOBIAS: I am not under cross-examination.

THE COURT: I think you are obligated to answer that question.

MR. TOBIAS: I think what we have to do is that we can show in particular circumstances contact visits may not be required. I believe Judge Lasker stated one of the reasons for imposing contact visits, though not the exclusive reason, was the fact that the visits at the Tombs were ineffective. There was too much noise, perhaps the visits at M.D.M. would not be so obstructed.

THE COURT: In an off the record discussion the Court has indicated that it is not a question of the Court requiring the City or asking the City to prove anything. It is the Court's intention to order or to issue an order containing many provisions relating to many of the subjects requested by the defendants not necessarily precisely in the terms requested by the defendants, but something on those subjects which I will specify in a moment.

I am giving the City an opportunity to put evidence before me as to why such items should not be ordered by the Court or the extent to which if an order is entered it should be limited.

Do you understand my theory of the situation?

MR. TOBIAS: I do.

THE COURT: I will indicate what subjects I am seriously considering. I guess, to some extent, I should say I am seriously considering entering an order which

contains provisions as to all of these subjects but I do feel differently about some than others and I will make some brief observations.

I believe on the whole that subject to whatever facts distinguishing the situation at Rikers Island from the situation at the Tombs you wish to put before me, it is appropriate to enter an order with regard to the classification, with regard to lock-in time and optional lock-in, with regard to access to visitors and counsel, with regard to contact visits, with regard to a visiting schedule, although as I have indicated I clearly understand that at least as to that subject in particular I will say -- not at least as to that -- there are significant differences of facts affecting Rikers Island as compared to the Tombs. There is a question with regard to telephones to the extent, at least, that the question of right to the use of telephones per se was not an item of litigation in the Tombs case or in this case. We are still dealing with the Tombs case.

Recreation is a subject which it seems to me is clearly before the Court. My ruling or my decision of January 1974 was not restricted to the fact that recreation at the Tombs happened to be on the top of the roof but that it was so limited in time per man, and so forth, and I

understand to my surprise, frankly, that it's approximately equalled at Rikers Island.

Discipline seems to be no problem because the City has indicated that it does expect to apply whatever rules eminate from this case at Rikers Island. Am I correct on that, Mr. Tobias?

MR. TOBIAS: Yes. Of course, with those exceptions. With the exceptions indicated in the order.

THE COURT: That we will have to , of course, determine.

MR. BERGER: Does that include, Mr. Tobias, the denial of mail and visits as punishment? You are opposing that in the Giampetruzzi matter.

MR. TOBIAS: That is correct, anything under litigation. They will both be determined by Judge Lasker.

MR. BERGER: You won't comply to that even for general population?

MR. TOBIAS: Correct. That will be determined by Judge Lasker.

THE COURT: I am only talking at the moment about the rights of detainees that are removed to Rikers Island. I should think, although it's entirely up to the warden, that it would be somewhat chaotic for him to apply two sets of rules.

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MR. TOBIAS: That is the reason we have to apply the same rules.

MR. BERGER: I may be arguing the wrong case but it sounds to me on that issue of continental developments this City didn't appeal that. They didn't appeal that and they are coming in again saying we still don't want to do it.

MR. TOBIAS: There is going to be a ruling shortly on that anyway.

THE COURT: I admit I have no jurisdiction with regard to persons in this case. I have no jurisdiction with regard to persons other than the persons who will be transferred from the Tombs. I would be less than candid if I didn't say I know of nothing which would require a different rule at Rikers Island than the one that has existed at the Tombs, but I am prepared to hear argument on it.

MR. TOBIAS: I think that the Giampetruzzi argument may be of some value now in this area.

THE COURT: I also am prepared to enter an order with regard to correspondence. I do think that there is a serious question with regard to the authority of the Court to order overnight housing in New York County and I think that the question depends, to a substantial extent,

on the construction of the language of the Court of Appeals opinion and whether it be regarded as authorizing language or limiting language.

I think, however, that a very serious problem, and I am now simply observing as a citizen what I know is happening in the City, is going to be created with regard at least, to contact with counsel. I am sure that the Department must be aware of it. They must have been advised of the report of the New York County Lawyers Association on this subject. My understanding is that the Bar Associations have even requested conferences with the Mayor to discuss this subject. But that is neither here nor there. I do regard it as a serious question as to whether I have authority on that.

MR. TOBIAS: I think three and ten are inter-related, access to visitors and counsel.

THE COURT: They are inter-related, yes. When I referred to No. 3, of course, I was talking about Rikers Island, what happens at Rikers Island.

Mr. Tobias, is there anything else you wish to add about the City's position? It seems to me it has been fully expressed to me but I don't want to curtail you. I do have to go to court.

MR. THOMAS: In reference to Mr. Berger's visits

tomorrow, let's stipulate you are going to bring only members of the plaintiffs.

MR. BERGER: Just myself and Mr. Herman.

MR. THOMAS: Okay.

THE COURT: You will get to like them, warden, and you will get to know them.

MR. THOMAS: I have an appointment with a doctor tomorrow. If you can get there, I would prefer you to be there some time after twelve o'clock.

MR. BERGER: Fine, we can do that.

MR. THOMAS: You will just get a tour of the institution but not to talk with the inmates.

THE COURT: Right.

What is it you need to inquire about?

MR. BERGER: It's more than a walk-by. A man can ask to speak to me and you turn your head and walk away or walk by him. I feel I should answer him.

THE COURT: Just say the warden has asked you not to today.

MR. THOMAS: Thank you, Judge.

MR. TOBIAS: We are to be back here Friday?

THE COURT: Let's get out that nasty book of mine.

How about next Thursday, the day after Christmas

for a visit? I will be prepared to come out to Rikers Island on Thursday, the 26th.

Will you be there, warden?

MR. THOMAS: Yes.

THE COURT: And this Friday at eleven o'clock.

* * *

TRANSCRIPT OF CONFERENCE AND HEARING
December 20, 1974.

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James Rhem, et al.
v. 70 Civ. 3962
Benjamin J. Malcolm, et al.

New York, New York

December 20, 1974
11:00 o'clock a.m.

- - -

(Proceedings resumed.)

- - -

Present:

JOEL BERGER, ESq.,
STEVEN HERMAN, Esq.,
Attorneys for Plaintiffs

DONALD J. TOBIAS, Esq.,
Corporation Counsel

WILLIAM RITSCHTZ,
Department of Corrections

THE COURT: All right, gentlemen.

MR. TOBIAS: Your Honor, the papers being prepared will be forthcoming in about a half hour.

THE COURT: Are you in a position to state for the record what you believe they are?

MR. TOBIAS: Yes.

THE COURT: All right, gentlemen.

MR. TOBIAS: I will deal, first, with the

Nos. 1, 2 and 4 which I feel are interrelated, that is, classification, lockout time and contact visits.

THE COURT: 2 is not lockout time, it's lock-in time or optional lock-in.

MR.TOBIAS: I believe that at the present time the Department of Corrections is involved in a classification process. Your Honor understands this process. It's process done pursuant to General Order 33.

This process does, in fact, separate the maximum security risks. It separates other people in other categories which, I believe, your Honor, is familiar with, special observation cases, detoxification cases, medical cases, things of that nature. When we speak about classification we must look at what we are trying to classify for. We submit that the only purpose that classification could be used for, if any purpose at all under the fact pattern at the New York City House of Detention for Men, would only be contact visits.

We feel that the lock-in and lockout practices that are afforded now are necessary to achieve the proper administration of the institution.

The lockout schedules and the implementation of that schedule is not done, we submit, for security reasons and we feel that it would be very easy for us to prove that.

We are dealing with large blocks of inmates. We have anywhere from 120 to 150 inmates on the side. The lockout practices as presently structured afford the correctional personnel to properly supervise the tiers and allow the administrative activities such as tier sanitation, inmate feeding, a change of rotation of officers all to take place.

In addition, I failed to mention head counting which has to be done. We believe that we can justify the time sequential breakdown of an inmate's day from the time he gets up until lights go out. We feel this is a matter of administrative policy which, in fact, Judge Judd sustained as lawful when he examined the situation at the Queens and Brooklyn Houses of Detention for men.

THE COURT: Incidentally, do I have copies of his determination?

MR.TOBIAS: Unfortunately, I neglected to bring it. I will forward it to you today. I feel that decision is definitely relevant. There were two issues in that decision. One involved, as you undoubtedly know, the double cell practice. The other involved what the plaintiffs stated was excessive confinement.

At this trial, in which Mr. Herman and myself participated, it was alleged that if you properly classify

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people you can alter the lockout practices and the lock-in practices.

But the plaintiffs focused their attention on increasing lockout time and altering the lockout schedule at least for certain classes of inmates.

In addition, the plaintiffs tried to prove that the optional lockout, which was not in practice at either the Brooklyn or Queens Houses, could in fact be instituted upon the implemention of a classification system.

The Judge completely disagreed with the contentions raised by the plaintiffs and sustained the defendants' position entirely, as a matter of fact, after the trial motions were made by both sides pursuant to Rules 59 and 60.

They were complicated motions. Each side wanted various relief. One of the reliefs, one of the forms of relief sought by the plaintiffs in this case was to have Judge Judd's dismissal of the excessive confinement allegation without prejudice after his entire order was implemented. Judge Judd refused to do this, and I think rightly so inasmuch as both institutions had been reviewed extensively on trial, the lockout practices, the lock-in practices had been reviewed.

MR. BERGER: Will you tell Judge Lasker what else

Judge Judd said in denying that motion?

THE COURT: You will have an opportunity to add to that.

Mr. Tobias, this is Velvano you are talking about?

MR. TOBIAS: Yes. For purposes of trial that case was combined with the detainees --

THE COURT: However you character that I will before me whatever happened there, is that correct?

MR. BERGER: We can submit it.

THE COURT: If it becomes critical.

MR. BERGER: Judge Judd invited us to make a Rule 60 motion once the population went down --

MR. TOBIAS: Judge Judd stated that they can always make a Rule 60 motion.

THE COURT: It is not necessary for you gentlemen to comment on that. I will have to look at it myself.

MR. TOBIAS: The lock-in and lockout practices at the Brooklyn-Queens Houses of Detention are basically the same as those in the New York City House of Detention for men.

THE COURT: Aren't they basically as they were in the Tombs too?

MR. TOBIAS: There are small differences.

However, I will say this: That the Riker's Island institution offers optional lockout which the Brooklyn-Queens did not.

THE COURT: To some extent, right.

MR. TOBIAS: Which these institutions did not. Yet Judge Judd nevertheless found this to be of constitutional practice.

THE COURT: Okay. I have to review my own findings in regard to the Tombs and so on. I have very, very high regard for Judge Judd not only as a good lawyer but as somebody who is most sympathetic for the considerations on the plaintiffs' as well as on the defendants' side in this kind of matter. But I have to make up my own mind with regard to these facts.

MR.TOBIAS: We feel we could very easily justify the lock-in and lockout practices on trial notwithstanding the security classifications of any inmates.

THE COURT: Mr. Tobias, let's get back to the reason for this discussion. The reasons for this discussion, as I see it, are to determine what facts I ought to here before I enter any order regarding people who have been transferred from the Tombs and essentially, it seems to me, the only facts that I would have to hear, whatever they are, would deal with the difference in the conditions

at Riker's Island from the Tombs because whatever Judge Judd said, if I found that the conditions regarding a particular subject matter are precisely the same at Riker's Island as they are at the Tombs, then it seems tome there is no question but what I have to enter an order with regard to that particular subject as I would have if the plaintiffs were still at the Tombs.

Now, I amnot saying that on any subject the facts are exactly the same. But I do say that with all my regard for Judge Judd and naturally looking for guidance wherever it can come from, that the critical question that we will have to decide is what is the difference between Riker's Island and the Tombs. Would you care to comment with regard to lock-in or rather classification? Really you are talking about lock-in.

MR. TOBIAS: And its relation to classification.

THE COURT: What is the difference between the lock-in practices at Riker's Island and the Tombs?

MR.TOBIAS: The lockout hours may be the same. There may be an hour's variation.

THE COURT: I know the physical structure of the place is somewhat different.

MR. TOBIAS: It is different. A substantial point your Honor has to keep in mind is the fact that the

inmates have day rooms in which they eat. So although counsel may say they are locked in their cells for X number of hours, actually a substantial portion of this supposed lock-in time is actually spent out of the cells in day rooms eating, which is not counted as part of the lockout period.

THE COURT: You are getting me mixed up. You have been bandying lock-in and lockout interchangeably. When somebody is locked in I understand that to mean they are in their cell. They can't be in the day room. If you are saying part of the lockout time is spent in the day room --

MR. TOBIAS: No. I am saying part ofthe time -- let's say you have lockout from 9 to 11 and then you have it --

THE COURT: Lockout?

MR. TOBIAS: Lockout. And then you have it from 11 to 1. This two-hour time gap in the Tombs --

THE COURT: Between 9 and 11.

MR. TOBIAS: Yes.

MR. RITHOLTZ: 11 and 1.

THE COURT: Yes.

MR. TOBIAS: Which, I assume, the plaintiffs want to somehow eliminate, we submit that that gap is really much less a gap when you consider the fact that after 11 o'clock half of the inmates at a time go into day rooms

to eat. So the time they are locked in is not really lock-in time. An hour of this gap approximately is spent in the day room eating.

THE COURT: Rather than arguing, maybe that is true about that particular hour. But let me remind you again. But let me remind you again as to the purpose of my asking you to be here today. It was to specify the items on which you believed further factual evidence had to be put before me before I could appropriately sign an order and what you propose to prove with regard to that.

What is it you want to put before me on lock-in?

MR. TOBIAS: I want to put before you on lock-in the fact that during the waking hours I can justify, the department can justify, every moment that the inmates spent locked in their cells and we can justify it not on security reasons but rather on administrative grounds.

THE COURT: All right. I think that may be appropriate for me to hear something on that just to be sure that the situation, to the extent that it differs from the Tombs, is not unjustified. But I don't think it should take very long for you to put that before me.

MR. TOBIAS: It may or may not.

THE COURT: To hear what the facts are, they are what they are.

MR. TOBIAS: I think that when you talk about classification, the next question you have to ask is what is the classification going to be used for? We submit that this analysis will enable your Honor to come to the conclusion that classification is divorced from the issue of lock-in and lockout.

THE COURT: What you are really saying is this, if we get down to brass tacks, my theory which we all agree has been sustained by the Court of Appeals is this: Nobody is to be kept locked up more than he needs to be in order to keep the place safe. Yo are saying that nobody is locked up, you can prove to me, more than he needs to be.

MR. TOBIAS: Absolutely.

THE COURT: To administer the place.

MR. TOBIAS: Right. I am saying we can have a group of angels there, so to speak, and you still need the same structure. It isn't a security structure.

THE COURT: Even if it were a security structure -- well, you mean because it's not a security structure you don't need a classification system? I find it hard to believe it can be that clearcut, but you are entitled to a reasonable opportunity to persuade me.

MR. BERGER: May I be heard with regard to lock-in time.

THE COURT: We might as wel do it on an issue by issue basis.

MR. BERGER: If there are any reasons why the physical structure of the House of Detention on Riker's Island necessitates different administrative grounds for lock-in or lockout, I can understand a hearing on that.

What I am concerned about is what Mr. Tobias proposes, which is to introduce many of the same administrative regions, why somebody has to be locked in anywhere that were already tried.

THE COURT: I have specified before and, if necessary, I will do it in writing again and in the record and every other way, and by exclusion of evidence, if it has to be at any hearing, that I am only interested in differences between the Tombs and Riker's Island. I cannot specify precisely what those differences may be.

For example, you have to have a head count in any institution. There is no question about that.

On the other hand, there may be certain differences, and I don'tknow, I am not pretending to know in advance, in the physical requirements of performing some of these rites on a tier of 150 men horizontally, then there is in the physical structure of the Tombs. I am not suggesting anything to the defense counsel. I just state what occurs

to me as a possibility. So I don't think that we can or that I can conscientiously state in advance that you can't prove anything to me. But I do say it has to be related not to what Judge Judd said or theoretical propositions or starting from scratch, but taking as a base what was at the Tombs and how this place is different, and, therefore, your ruling at the Tombs --

MR. TOBIAS: Your Honor, it will be necessary to show how this particular institution is administered for all its peculiarities.

THE COURT: I am willing to accept that as a general proposition and that, of course, is the reason that I plan, as soon as possible, namely next week, to spend an entire day there and I want to be sure of one thing. I haven't got the time and neither have all of you, I suppose, to come out to Riker's Island and, therefore, I want to be sure that on the day in question you do put before my eyes every proposition about which you are going to want to argue thereafter, and if necessary, I can hear witnesses tell me what their conclusions are as a result of that. But I want you to show me that tier is X feet long and, therefore, and so on. Some of this I understand already.

MR. BERGER: If I can have thirty seconds to clarify the record about Judge Judd.

The decision came down before your Honor's finding concerning the Tombs was affirmed on appeal, the Court of Appeals specifically mentioned the 16-hour lock-ins as one of the things they were affirming you want. We chose not to appeal Judge Judd's ruling since it was basically a favorable decision on all other points but to accept his invitation that if they didn't voluntarily increase lockout ove the next year, as population went down due to his one man per cell ruling, then we would be entitled to make a Rule 60 motion and he would entertain it. That is the status of the case before Judge Judd.

MR. TOBIAS: Your Honor --

THE COURT: Gentlemen, there is no point in arguing about something on the record. I will look at it.

MR. TOBIAS: It's not the way Mr. Berger characterized it at all. It's as if I wasn't there. I saw what went on.

THE COURT: He says it isn't the way you characterize it. Why should I buy one proposition over the other? I don't buy any of them. I have heard his position and I have heard your position. I will have to evaluate it myself.

MR. TOBIAS: With respect to the implementation of contact visits we maintain that there are

differences in the visitation booths existing at the House of Detention for Men on Riker's Island vis-a-vis the visiting booth that you saw when you conducted the trial originally a few years ago.

THE COURT: What difference in the booths are there? Can you touch your visitor?

MR.TOBIAS: No.

THE COURT: What difference is there?

MR. TOBIAS: The fact that the visits are conducted in an orderly manner. They are not conducted in an atmosphere of mayhem --

THE COURT: I don't understand that.

MR. TOBIAS: In your decision it was specified that visits at the Tombs were in effect because of the surroundings, the glass was dirty, there was noise.

THE COURT: Come on. Those were things that I mentioned in passing. But do you think that was important when I said you ought to be able to touch a wife's hand and kiss a child, and so forth?

MR. TOBIAS: That is obviously another element.

THE COURT: Mr. Tobias, I know what I held and I believe the Court of Appeals affirmed me in what I held. Contact is contact. It doesn't consist of a clean window

or even a phone that works. The others were just aggravations of a situation.

MR. TOBIAS: I think we have increased the visitation schedule to such a degree that one can have a personal visit as many as six times a week if they have children.

THE COURT: I appreciate the increase. I commend the city for its increase from a low base but, nevertheless, I commend them.

MR. BERGER: 5, 1 and 6 a week.

MR. TOBIAS: Between 4 and 6 a week.

We feel that we can show that this pattern of visits with the psychological assurances that it creates --

THE COURT: No, Mr. Tobias, we are not starting from scratch. We are starting from the Tombs. What is there at Riker's Island that makes it less secure to have contact visits than at the Tomb's?

MR. TOBIAS: The defense on this aspect, your Honor, will not be centered around security.

THE COURT: It seems to me there is no other defense.

MR. TOBIAS: If you examine the totality of conditions at the Riker's Island institution we feel that everything balanced --

THE COURT: You are a heartless man, Mr. Tobias. I am serious about that. I don't know how the city can go on talking forever as if we are not talking about absolute human tangible values.

Do you think that it makes up to have four visits or three visits to be able to hug your wife? I am as basic as that about this thing and so is Dr. Meninger. You might as well get my point.

You can disagree and you can go back to the Court of Appeals. If you prove to me -- and you have quoted some eloquent language of mine pointing out how I had to balance, or a Court has to balance, and I agree with it, I don't go back on a word you quoted, it is my responsibility to see to it if there is a risk as to security that that is taken care of first and that it why I zeroed in on that point.

It's the very thing that you quoted to me. If there is something about security on Riker's Island that I don't know about, that I shoud know about, I want to know about it and I will hear about it. But that is all.

MR.TOBIAS: Your Honor, the offer of proof we are going to submit to you is going to relate the conditions in a totality at Riker's Island. I realize your Honor excepts to this offer and I realize that this could

be subject to further review on the city's part.

THE COURT: If you are taking a position for the record, that is fine. You are entitled to do whatever you want.

MR. TOBIAS: Which is what we are doing.

THE COURT: Let's understand each other. I don't have to act so eloquent then.

MR. TOBIAS: We do feel, however, your Honor, we would like to show you that on balance --

THE COURT: I am not saying Riker's Island is a chamber of horrors, no. It didn't give me that impression in the middle of August and I would be surprised if it gives me that impression now. I don't think it's a jolly, jaunty place, but it certainly, in comparison to the Tombs, is a significant, aesthetic and institutionally superior establishment.

But I do want to say this: That my holdings, various holdings in the January opinion, which I will reread, not just to refresh my recollection but to be sure that I am correct in my assumptions as to the propositions on which I have been affirmed, did not rest solely or exclusively on the totality of the conditions at the Tombs.

I did say, you know, if you got X and Y and S

and A, B and C all put together, that is terrible. But I also said in a number of places that specific items were unconstitutional in themselves.

For example, we talked about mailing last week. If you had the finest institution in the world and the mail was not deliberable under constitutional conditions that would be incorrect.

MR.TOBIAS: I believe --

THE COURT: I just say that so you don't spend too much time stressing the theory of totality of conditions. You can state it for the record but I think it's an incorrect analysis both of my opinion and of the Court of Appeals.

MR. TOBIAS: I would just like to say that I think in light of the substantial negative finding that your Honor gave to the Tombs and in light of the differences generally in the Riker's Island institution I feel that the prisoners themselves -- the psychological level of the prisoners on a scale would not need the contact visit in this environment as much as the other. I realize there is a difference here.

THE COURT: Okay.

MR. TOBIAS: I have stated that for the record.

THE COURT: All right.

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MR. TOBIAS: Getting to the personal visiting schedule, I feel that the visiting schedule that is now structured is much more than comparable to any detention institution in the country.

THE COURT: I agree, not on the virtues of the present system. Certainly there is a great improvement over what it was. It seems to me fair for me to start on the assumption that the city has made the effort to do the best it can. But I do agree with what I assume is your view, that before I can sign an order ordering more visits than are now being vien on the revised schedule you are entitled to present to me the problems that prevent that.

MR. TOBIAS: Absolutely.

THE COURT: We don't need to waste time on that.

MR.TOBIAS: I would state for the record that the visiting schedule, as revised,represents the maximum strain in the facilities.

THE COURT: I assume that you do. But they are asking me to do more and I won't do more without hearing why you say I should do more.

On the other hand, I just can't agree with you either. I have to get the facts for that one.

MR. TOBIAS: I would state for the record that we plan to show not only is there a limitation in terms

of facilities at Riker's Island -- as your Honor knows Riker's Island is shared by about six institutions using one central focal point for visits. Even though the visits are conducted in different institutions they have to be channelled through a bridge area.

THE COURT: I know.

MR.TOBIAS: We are going to show the limitations in the facilities at the Riker's Island complex and at HDM. In addition, from a constitutional standpoint, I would like to prove that these visits, the type of schedules being offered at HDM is much more than comparable to the visits in other detention facilities.

MR. BERGER: That we have been through already. I can understand differences of the system at the city house. The Court found that the hours that were given at the time this case was tried were insufficient. And the Court of Appeals specifically found that comparisons with other institutions are not the basis here.

They said the fact that other places may be worst does not mean that New York City is performing adequately.

THE COURT: Let me say this, Mr. Berger: We don't need, at least at this meeting today, to argue constitutional theory except to the extent that it's relevant on whether I shoul hear any facts at all. There is no question that

on this subject I have to hear the facts. You may be quite right and I will think carefully and it's appropriate for you to state your position.

This doesnt' make much difference what is done elsewhere. It's a question of what can be done here. That is all I want tohear evidence on anyway. What can be done at Rikers Island.

MR. BERGER: We both put evidence, in the original trial, of elsewhere, including the fact that most cities that you have weekend visits. For Mr. Tobias to want to reopen things that were tried already --

THE COURT: Mr. Tobias isn't asking, as far as I can see, to reopen on that subject and, in any event, I am not going to allow reopening. I am interested in hearing what the facts are at Rikers Island. If you want toput the facts before me on a stipulated basis as to what they are elsehwere, and it doesn't take time, I can look at my opinion and at the Court of Appeals' opinion to see the significance of that. I would think it may have some peripheral significance.

In any event, let's go on to the next subject matter.

MR. TOBIAS: The next subject is telephones. This was not a subject that was litigated in the Rhem case.

Frankly, I don't know what it's doing in this judgment.

THE COURT: I think it's justifiable to ask the plaintiffs' counsel on what basis they think I have authority to order the telephones in. I must say, I am a little confused because when Commissioner Malcolm appeared at the meeting that we held immediately after the Court of Appeals affirmed my January opinion, I think it fair to say that he as much as asked me to order the city to do something of this kind. Of course, if the City changes its mind the question arises if I can do it on a unilateral request.

MR. BERGER: Your Honor, the reason it's in here, it's not in here -- it really shouldn't be standing alone.

Perhaps we should have made it part of a different paragraph.

The problem is the total isolation of Rikers Island the way in which that deprives people of things that they had at the Tombs. The people at Rikers, it's hard for the visitors to get their --

THE COURT: I understand that thoroughly. They are going to miss some things they didn't have. They are certainly going to miss access to counsel easily. Whether the community as a whole is going to be able to pressure the Mayor or somebody into doing something about that, I don't

know. I got copies, and maybe you did too, from the Community Services Society which wrote to the Mayor yesterday.

That isn't the question. The question is do I have the authority. I have serious doubts that I have the authority. I will do anything I can to assist the city which I know wants to do something about this. I believe you would like me to have them move faster than they probably will. I have serious question whether I have the authority to do it on a non-litigated basis.

MR. BERGER: In our brief we did point to the opinion that spoke to the importance of access to family and we feel that in the Tombs we didn't have to litigate. The telephones were part of that because people already had much greater access than they have on Rikers.

THE COURT: It's still the fact that although there are reasons for its not being litigated at the time, it wasn't. My approach in this case has been at all times to build on the most solid foundation and I think it's proven to be a good policy.

I am perfectly prepared to exercise the powers of this court to do everything it can -- or not it can, but it ought to do and has the authority to do vis-a-vis the plaintiffs, but I don't want to undermine the effectiveness

of our accomplishments by ordering things I don't have authority to do.

If you can persuade me I have authority to do it, I will give serious consideration to it. And I am somewhat surprised that the city opposes it although since they take a monolitich approach to the subjects of not wanting to admit the authority of the Court to do anything more than is necessary, I suppose that is part of the whole approach.

MR. BERGER: Your Honor, we rest upon what we said in the brief on the question of access, bearing in mind we do plan to bring in a new lawsuit, of course, on the city.

THE COURT: Frankly, I didn't know. I am not surprised, but I didn't know.

Mr. Tobias.

MR.TOBIAS: With respect to recreation, this has been a subject of some revision even since our last meeting. The recreation schedules at the House of Detention for me afford greater recreational opportunities when you compare it to the Tombs. About that there is no question. There is a gymnasium and outdoor yards.

THE COURT: The question is whether it's enough.

MR. TOBIAS: Right. During the summertime the inmates are afforded use of the yards for a period of

four days a week. The periods are in excess of an hour. We submit that, as a matter of law, that is enough.

THE COURT: How much does each man get a week?

MR. TOBIAS: Of course, the yards are not used on weekends. Each period is stretched somewhat over an hour, between an hour and fifteen minutes to an hour and a half.

THE COURT: A man gets an hour a week, is that what you are saying?

MR. TOBIAS: An hour a week?

THE COURT: I understood an hour a day.

MR. TOBIAS: That is a misrepresentation.

THE COURT: I will have to hear the facts.

MR.TOBIAS: I saw those affidavits.

THE COURT: I won't argue with you. If the facts are different on recreation -- they are bound to be somewhat different. Certainly the facilities are all different.

MR. TOBIAS: I believe you heard on the Giampetruzzi case evidence on this matter.

THE COURT: I wouldn't zero in on it the way I would now. Perhaps both sides are agreeable to using whatever material is there but it can't take very long for somebody who knows what is going on to tell me what is going on. Of course, I will look at he facilities when I visit next

week with a different eye.

MR. BERGER: What we have here is a simple dispute of fact. I am not there in the yard when they go out there. My clients tell me that although the schedule says four times a week, they are actually let out into the yard only once or occasionally twice a week.

THE COURT: We will have to have a hearing. If there is a direct confrontation I have to decide who I believe.

MR. TOBIAS: When we talk about physical exercise the extensive space available at HDM, I think, would allow the inmates a more effective basis to exercise among themselves ad hoc exercise, not talking organized periods now. I believe this is relevant as well.

THE COURT: You don't need to argue the case now. We are here to frame the issues.

MR. TOBIAS: I would like to show not only obviously that there is organized recreational programs that go on in the institution, but also that the institution offers inmates opportunities to exercise by themselves and that, in fact, it's done.

THE COURT: In their cells or out?

MR. TOBIAS: Outside their cells as well.

THE COURT: Somebody suggested in the Tombs'

case they do pushups in their cells.

MR. TOBIAS: I know your Honor didn't weigh that very seriously. I am not going to introduce that kind of proof.

THE COURT: I am trying to save time here. You have another case to deal with after this one and that is fine. You can bring these things to my attention.

MR. BERGER: That was only summer recreation. The rest of the year there is the gym and they only go once a year.

MR. TOBIAS: I don't agree because it was revised yesterday. There was going to be outside recreation in the wintertime, weather permitting.

THE COURT: I take it those plans are not sufficiently formulated --

MR. TOBIAS: They are sufficiently formulated.

THE COURT: Then you can throw them in the hopper and I will hear it.

MR.TOBIAS: They are going to get outdoor recreation, weather permitting, twice a week in addition to the gym program. The recreation outside will be in excess of an hour. I think, as a matter of law, I am not arguing the case now --

THE COURT: I think this is all going in the

right direction. Who knows, I might even find that it's okay.

MR. BERGER: Your Honor, my only reservation, I think you will see it when you get out there, is that they do have a lot of space.

Unfortunately, since you were last out there they have acquired a tremendous number of inmates. It's grossly overcroweded and when you have two hundred people going out into that yard, it makes a difference.

THE COURT: And you are going to have more now.

MR. TOBIAS: Discipline --

THE COURT: Discipline we have no problem.

MR. TOBIAS: Correspondence. The policy on this issue hasn't been totally formulated. I do reserve the right though to put in evidence. I would like to reserve the right to put in evidence to show that the library and library facilities are adequate.

THE COURT: I believe, and my opinion had nothing to do with the question of whether they were, I did point out that I thought that the floor libraries were inadequate but I regard the right to receive books and magazines primarily as a right of correspondence almost and a right to read.

MR.TOBIAS: Yes, but I believe your Honor did

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exercise the weighing process here too. I just read the opinion yesterday.

THE COURT: You probably know it better than I do.

MR. TOBIAS: I doubt that, your Honor.

THE COURT: I don't have to go back and read it all the time. This is the first time I will have had to in a while.

MR. BERGER: There are different quotations on the first amended one from Hodge and one from Stanley V. Georgia.

THE COURT: I don't think it's correct, but I am certainly not averse to taking a look at the library. I remember the library at the Tombs very well. I remember the library.

MR. TOBIAS: Your Honor, here it reads that "The burden of this limitation might not be great if the institution supplied books, periodicals and newspapers in reasonable number, but two court inspections of the printed material available to inmates at MHD established decisely that the number of books or other items is grossly insufficient".

THE COURT: What is the big problem about receiving books? Is it manpower to inspect them?

MR. TOBIAS: That is the problem.

THE COURT: There is nothing else, is there?

MR.TOBIAS: Plus they are a conduit for contraband.

THE COURT: That is why they have to be inspected. But that is a manpower problem, pure and simple.

MR. BERGER: In the legal section of your opinion your Honor found that that problem did not outweigh the First Amendment rights involved.

THE COURT: In any event, assuming -- which I don't think is the assumption I will abide by -- that evidence on that subject is necessary, it can't take more than ten minutes to show me what you are doing.

MR. BERGER: Simply observe the library when you are there.

MR. TOBIAS: The only thing that remains in the proposed judgment, what I have grouped together on Nos. 3 and 10. I feel that these have no place in this judgment in the same manner that I believe the telephones didn't have any place in the judgment in that they were not subject of the Rhem suit. I believe in light of the fact that Mr. Berger has indicated he is going to bring another lawsuit on these issues, this is something that this Court ought not deal with at this time.

THE COURT: I think I previously indicated my serious doubt as to whether or not I have any authority. This is like the telephone question, to do anything about these issues in this case. Because they have not been part of the subject matter of the case up to now and I haven't ruled on them and the Court of Appeals hasn't ruled on them in so many words.

It is true that there is language in the Court of Appeal's opinion which talks about one of the possibilities being the use of the Tombs as an overnight housing facility. That language not to be authorizing language but to be -- how can I put it -- not to be authorizing in the sense that it authorized me to require the city to keep the Tombs open for overnight, but that it authorized me to limit the city to the use of the Tombs for an overnight facility in the event that I didnot find them to be doing what I felt was necessary for general use.

MR. TOBIAS: That is my understanding as well.

MR. BERGER: Your Honor, that is a reasonable interpretation from the printed page. There is one additional fact which enters into it which is the oral argument Mr. Buxbaum announced that should the city lose their appeal that their plan was to probably close the institution. That is why I think that the Court of Appeals' reference to

keeping it open for overnight housing may be of great significance.

THE COURT: I will be glad to hear argument on it. I don't think it's necessary to hold evidence at this point. If you wish to bring my attention to the transcript of the argument before the Court of Appeals, if there is such a transcript and you think it would shed light on what the Court of Appeals intended, I am willing to consider the matter. But it would have to be pretty heavy proof.

I think in the whole light of the situation the construction which I have specified is very likely to be the right one.

MR. BERGER: With regard to the access, there I do really feel that it is before you. After all, these men were in Manhattan where they had very easy access to their lawyers and their families. They brought this lawsuit to try to get themselves a better jail. Instead of getting themselves a better jail they find themselves shipped out to Rikers Island solely as a result of having brought this lawsuit.

All we are asking is they ought not be brought in a worse situation than when they brought it. They are in a worse situation as a result of their isolation.

THE COURT: Look, there are methods by which the

plaintiffs can seek the relief that they are asking for in this judgment from this court or any court -- not any court, any competent court -- by one of two ways and which there is no reason we shouldn't discuss because we are all lawyers.

One is by instituting a new suit or amending the complaint in this case which, I think, would be a clumsy thing to do, and I am not suggesting, and I would probably have to deny.

In the long run or even in the short run there is no doubt you can get your problems before the courts.

The real question, it seems to me when we are talking about the authority, Mr. Berger, of the Court is not whether there is a court somewhere that can grant this relief if it's justified, but what that court has to have had before it before it can do that.

MR. BERGER: I understand that. Obviously we need the hearing.

THE COURT: I am most skeptical of my authority on the record before me, as significant as it is and as significant as the backing of the Court of Appeals is. For example, to order the city to establish a system for transporting the plaintiffs to New York, I don't see how I have the authority to do that much as I am concerned,

and I am deeply concerned as the Judge responsible throughout this litigation for this set of facts, about the result that has occurred from my rulings.

MR. BERGER: Your Honor, I certainly agree that we would need a hearing. I agree entirely we couldn't get this on the basis of the record now.

THE COURT: You should file your complaint and specify the issues and ask for immediate relief.

MR. BERGER: Very well.

THE COURT: That does it then for today.

MR. TOBIAS: I think so.

MR. BERGER: One additional point I want to bring up and that does not concern Mr. Tobias. The way we phrased this order was that these rights would pertain to anyone transferred out of the Tombs. Some of them were transferred up to Ossining.

As we noted in the briefs, certain of the things we are asking for, particularly with regard to lock-in times and expansion of the visiting schedule, would change current practices at Ossining. We did serve Mr. Berman, the Attorney General, with a copy of this.

THE COURT: You mean Mr. Ritholtz, and Mr. Tobias can't do anything about it.

MR. TOBIAS: It's not under our control.

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MR. BERGER: The city, I suppose, is partly involved.

MR. TOBIAS: It's a contractual situation.

MR. BERGER: They send people up there and if the state refused to do the things we are asking for at Ossining, if your Honor were to order them I suppose the city would have to find some place else to send people. To that extent, the city is involved.

We did not put in anything with regard to recreation at Ossining because they do have access to the yard almost all day. Discipline, correspondence, I assume won't cause them a problem. In fact, on correspondence your Honor's ruling was modelled after what the state does. But with regards to visiting schedules and lockout time, there would have to be changes at Ossining.

THE COURT: Well, we have to bite off one piece at a time at least certainly as far as the physical situation is concerned. If the state thought that I ought to visit Ossiing, that is easy for me. I live about three or four miles from there. But let's proceed on this.

Have you got any idea, Mr. Ritholtz, what percentage of the men from the Tombs will be going one place as distinct from the other?

MR. RITHOLTZ: No, I do not.

THE COURT: Do you?

Off the record.

(Discussion off the record.)

THE COURT: Perhaps we should sent down a day for hearing on this. I really believe it ought to be possible after our discussions, after my knowledge of the situation, after my two visits to Rikers Island, the second of which will be with the particular issues in mind thatyou want me to have in mind to knock off the factual presentation here in a day. I would like to set a day. We may have to begin early and work late.

MR. TOBIAS: I am wondering, your Honor, whether or not there will be a need for discovery.

THE COURT: I have been told in so many words not to hold another trial. Let's get the things we are talking about are the tag ends of a litigation.

MR. TOBIAS: I know that. If there are going to be inmate witnesses, if the plaintiffs are going to put on any witnesses --

THE COURT: I am not going to have a big production on their side either.

MR. TOBIAS: I think I am entitled to discovery.

THE COURT: This is a relief hearing. This is ridiculous. The federal rules have been criticized

from time to time by federal judges as resulting in two trials instead of one. Bring your people before me, I will hear what they have to say. Bring the other people before me. This isn't complicated.

You can cross examine a man easily enough about when in the hell did you last go to exercise there or why do you say you only went once when we said you went four times.

MR. TOBIAS: In view of the objection I expressed to this proceeding, which is on the record and will be in the offer of proof which I am going to submit, I had originally stated that I thought this would be more appropriate to do in the context of a plenary lawsuit. I still feel it is.

THE COURT: Don't keep repeating the thing.

MR. TOBIAS: I feel this short changes the defendants' ability to prove that the conditions in another institution are constitutional. I respectfully disagree. If we are going to have a hearing I respectfully disagree with us putting it in such short notice that discovery cannot be accomplished.

THE COURT: I understand your position, Mr. Tobias, and all I can say is that while I can understand that a man could sincerely feel as you do, and these are matters that

laws and people, reasonable people, can disagree about, my construction of my own ruling and the Court of Appeals in particular is to get this thing over with. I think it's not only that I have to be t[illegible]ut I think it's feasible. I think it's feasible because the issues have narrowed to the differences between what is going on in Rikers Island and what I have known for a long time did go on at the Tombs. I am not starting from scratch. I don't propose to start from scratch. If that is wrong, the Court of Appeals will send it back and say "Mr. Tobias is right, you have to hear everything he wants to put before you."

I am not going to do that unless they tell me so. So let's understand that.

MR. RITHOLTZ: May I say one thing. With references to the changes that were made there as a result of your decision --

THE COURT: Made where?

MR. RITHOLTZ: At the Warden Thomas place, the New York City House of Detention for Men. I think if you are going to hear testimony, the testimony would be forthcoming from the inmates that were transferred from the Tombs there and the conditions they have now at Rikers Island, specifically to this area of the recreation which

was changed yesterday.

THE COURT: If you want to call some of those inmates you are free to do so. If the plaintiffs want to they are free to do so.

MR. RITZHOLTZ: They wouldn't have had enough time to tell you what their recreation schedule is yet if you have the hearing next week on the 2nd or 3rd. I think the time limit, the 17th --

THE COURT: I don't need to hear them. If Warden Thomas gets on the stand and swears under oath that by a week from Tuesday all the inmates are going to have five hours of exercise a week, I will take his word for it and I will watch, and if they don't have it the following week I will do something about it. I don't mistrust all of you. Where one person says something is happening and another person says no, that isn't happening, that is another matter.

MR. TOBIAS: Your Honor, could we have it the 17th? If we are going to set it down on that date, I would appreciate then the 17th. The 2nd does create overwhelming burdens on us.

THE COURT: Maybe the 2nd may. Although today is only the 20th. That is two weeks. Why is it such an overwhelming burden? I should think Warden Thomas could

testify today about these things.

MR. BERGER: We discussed them yesterday when wewere out there with them.

MR. TOBIAS: In terms of preparation I would still appreciate if it was the 17th.

THE COURT: I won't go as long as the 17th, definitely.

Let's make it the 10th of January at 9:30 here in the courthouse, not at Rikers Island.

MR.TOBIAS: Your Honor is going to inspect the facilities on the 26th?

THE COURT: Yes. Assuming the guards will let me through I will meet you all at the warden's office at 10 o'clock on the 26th.

Do I need a passport or anything?

MR. TOBIAS: We will let you know the day before.

MR. RITHOLTZ: You won't have any problem. It has all been arranged.

THE COURT: Thank you gentlemen.

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TRANSCRIPT OF TESTIMONY, JANUARY 10, 1975.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BENJAMIN RHEM, et al.,

Plaintiffs,

vs. 70 Civ. 3962

BENJAMIN J. MALCOLM, et al.,

Defendants.

Before:

HON. MORRIS E. LASKER,

District Judge.

New York, January 10, 1975;
10.00 o'clock a.m.
(Room 2704)

APPEARANCES:

JOEL BERGER, Esq., and
STEVEN A. HERMAN, Esq.,

Attorneys for Plaintiffs.

DONALD TOBIAS, Esq.,
DAVID BERMAN, Esq., and

Attorneys for Defendants.

THE COURT: Before we proceed to the hearing of witnesses, I think it is worthwhile to state what we are here to accomplish today.

In an opinion published at 371 Fed. Supp. 594 and dated January, 1974, this Court determined that as to plaintiff class, certain enumerated conditions at the Manhattan House of Detention, known as the Tombs, deprived the members of the class of their constitutional rights. We all know the history of the case and thereafter, in which the City was ordered to present a plan to cure those conditions or to close the Tombs.

The City declined to submit such a plan. The case was appealed to the Court of Appeals, which affirmed the January decision in all respects, and, indeed, ordered this Court to proceed to a disposition of this litigation as rapidly as possible and not to retry the case.

After the affirmance in the Court of Appeals, the City advised this Court that it intended to and it now has closed the Manhattan House of Detention, at least, so far as I know, for all purposes involving detainees.

The proceeding today grows out of the fact that persons who were at the Manhattan House of Detention have been transferred to the New York House of Detention for Men at Rikers Island, which I shall refer to as Rikers

Island from hereon in.

The transferees have taken the position that the Court should order the defendants here to grand to the transferee plaintiffs the same rights as Rikers Island as they would have been entitled to had they remained at the Manhattan House of Detention. The Court agrees, as a matter of law, with the plaintiffs' contention that they are entitled to such rights, except to the extent that either such questions are not applicable in the Rikers Island situation.

For example, noise, heat and lack of ventilation was a substantial question at the Tombs, and the same conditions not only do not literally exist at Rikers Island, but I do not think there is a claim that there is any such unconstitutional oppressive conditions at Rikers Island. But to the extent that there is anything unconstitutionally oppressive at Rikers Island as compared to the Tombs, the Court agrees that the rights granted by earlier orders must be afforded to the plaintiffs who have been transferred to Rikers Island.

The purpose of this hearing, which follows an extensive tour of the Rikers Island facility made by the Court in the company of counsel and of the Commissioner of Correction and of Warden Thomas of the institution and a

couple of the plaintiff prisoners who had been at the Tombs in the first instance and were transferees to Rikers Island, is to determine, create a record of what factual differences exist between Rikers Island and the Tombs in regard to the subject matter at hand.

It is proper for me to point out in the City's behalf that it has taken the position at all times since the plaintiffs have pressed before this Court the contention that as transferees they are entitled to the same benefit as the Court ordered they should have at the Tombs, that such a claim on their part in effect constitutesd a new claim which requires the commencement of an entirely new lawsuit.

The City has taken the position that the proper procedure to be followed here is for plaintiffs, or anybody who wishes to make a claim such as now being presented to the Court, to institute such a lawsuit under such circumstances where the City would be entitled to a full discovery and a full trial and the Court would then rule. Of course, the plaintiff disagrees and the Court disagrees, The Court disagrees for two reasons primarily, first, because the Court regards the present request for relief as a proper integral part of the case of Rhem against Malcolm, which can be disposed of on the basis which I have ruled, namely,

by a comparison of the facts which exist at Rikers Island as to those which were found by the Court to have existed at the Tombs.

It is appropriate, I think, to point out that the Court does not approach the issues before it from scratch. Anything but. Although the Court may have started as a tyro and a novice at the outset of this litigation, the Court has on numerous occasions visited the Tombs, has held a trial of about one month's duration in relation to the issues at hand here, such as, for example, visiting privileges, recreation, and so forth, all of which involve not only the facts as to the particular institution, but the general views of experts as to what is appropriate in a prison setting and in a House of Detention under such circumstances.

In addition, the Court has now visited the Rikers Island facility twice for a total of what amounts to probably a full day's inspection, and although it is a reasonably large institution, I think that even Warden Thomas will agree that I have had a pretty good bird's-eye view of what goes on at Rikers Island.

The second reason for believing that the proper procedure to follow is not to commence a new trial is that the Court of Appeals in its affirmance of the Court's

earlier opinion specifically instructed the Court not to conduct a new trial. It is true that the Court of Appeals did not necessarily envisage a disposition of this case which involved the closing of the Tombs and the consequent pressing of claims such as those that are before me at the present time. Nevertheless, it seems to me that the spirit of its opinion is applicable to the situation at hand.

In any event, it is my view that as a matter of law the plaintiffs are not obligated with regard to the relief they are now asking for to start a lawsuit de novo. I have met with counsel to indicate what proof I thought would be appropriate to the issues at hand and what the limitations of that proof were to be. I will be pleased at any time the City disagrees with my views as to what proof is required here to allow them to make an offer of proof for the purpose of preserving the record.

I thoroughly understand the importance of the issue on which I am now ruling and I thoroughly understand that the City may wish to appeal from my view in the matter. But that is my view, and I think the City agrees that we should get on to the presentation of what the Court considers to be the appropriate evidence here, have me hear it, have me make a ruling, and if the City disagrees with that ruling,

appeal.

MR. TOBIAS: I would like to make a brief opening statement as to what the City will present today and as to how we plan to proceed.

The Court has noted our objections to this proceeding, and I won't say anything further about that. We are proceeding pursuant to the directions of this Court over objection.

There are basically four issues in front of us today. These issues are based upon the proposed judgment that has been submitted by the plaintiffs and as to which the defendants were invited to present evidence upon. Those issues, which have been narrowed down to basically four categories, are the issue of lock-out time, and, of course, its subcategory, lock-in time, the issue of recreation, the issue of visitation, and the issue of contact visits.

With regard to the first area, that is, optional lock-out time and lock-in time, so to speak, we plan to show that the situation at Rikers Island, the House of Detention for Men, requires the very lock-out scheme that is presently in practice. We will show through the testimony of Warden Thomas, who has been the Warden of this very same building for quite some time that the lock-out

scheme that is afforded is not only liberal, but, in fact, justified from the standpoint on the proper administration of an institution of that size.

The Court will see that the lock-out schedule is rather extensive in that people are not only given large blocks of lock-out time in which they are free to use the corridors and day room, but are also out of their cells during the period of time in which the eat. This is a distinction from the situation at the Tombs, where they didn't have the availability of the day room facility for meals.

In addition, on the issue of optional lock-out time, again there is a distinction --

THE COURT: You mean optional lock-in time --

MR. TOBIAS: Right. -- this Court in its original opinion that came down last January ordered the City to issue an experimental program of optional lock-out. The situation at Rikers Island has been one which has afforded optional lock-out --

THE COURT: Do you use optional lock-out in any different sense from optional lock-in?

MR. TOBIAS: No.

THE COURT: Let's put on the record when you use one it is equivalent to the use of the other.

MR. TOBIAS: As a matter of fact, in every instance except where necessary for administrative purposes we are going to show how option lock-out, is, in fact, practiced at the House of Detention for Men.

Moving on to the area of inmate visitors and visitation rights, again we will show that the present visitation policy at the House of Detention for Men is not only a liberal policy that must be construed by every stretch of the imagination as being one that is liberal and expansive, but also strains the facilities at Rikers Island and the House of Detention for Men to its limits.

I think the testimony of Warden Buono and Warden Thomas will be directed to this and will show what the facilities at the HDM are, and and when you take into account the logistical problems faced at Rikers Island, you will see the City has met the least restrictive test in this area.

THE COURT: You used the expression HDM.

MR. TOBIAS: That is the House of Detention for Men, which is the particular facility on Rikers Island that we are concerned with.

Rikers Island is composed of a group of institutions located on that island, some of which we are not concerned with, and I do understand, of course, that the

visiting schedule at the House of Detention for Men and its reasonableness is related to the facilities which exist there.

With respect to the area of inmate recreation, we are going to show that the situation differs vastly from the situation at the Tombs. At the Tombs there was no gymnasium, there was no outdoor facility. At Rikers Island there is both a gymnasium and there are outdoor facilities. During the hot weather months when it is appropriate inmates are given four periods a week each in excess of an hour in which to utilize the facilities and engage in physical recreation. During the cold weather months a gymnasium is available, and we are going to show that it is used by the inmates.

We would like to add at this time that we will also show that the present construction which is underway at this moment is going to enable Warden Thomas to further utilize the gymnasium in the building in that that further construction will relieve the House of Detention for Men from the necessity of sharing the gymnasium with another institution. So the scope here is twofold, not only are the facilities adequate as they stand now, but we are going to show that there is present progress towards expanding these facilities.

And, finally, in the area of contact visits, within 90 days the defendants will submit a plan to this Court which will allow the implementation of a program of contact visits to those inmates who do not present a threat to the good, safety and order of the institution.

THE COURT: That is the best news I have had in over a year. It really makes me feel as if something has come out of all this.

MR. TOBIAS: The final details have not been worked out.

THE COURT: I comment you and I am sure that counsel for plaintiffs do for taking this big step forward. I know there were many risks involved, but I feel it's a very great contribution to the welfare of the people that your dealing with.

MR. TOBIAS: At this time I would like to call to the stand Supervising Warden Buono.

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F R A N C I S R. B U O N O , called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TOBIAS:

Q Warden Buono, how long have you been with the Department of Correction?

A 34 years, going on 35 years.

Q What positions have you held with the Department of Correction?

A Well, every uniformed position starting with a corrections officer, including my position now, which is that of Supervising Warden.

Q What are the duties of Supevising Warden?

A Well, they are rather broad in terms of something fairly new. About five years ago we created the position of Supervising Warden.

THE COURT: Have you been at it since then? How long have you been Supervising Warden?

THE WITNESS: Since we created the title in November of 1970, sir. This position was found to be fairly necessary in that the Rikers Island complex was expanding to such a degree that it required some person to coordinate activities and certain types of controls over

all of the Rikers Island institution.

At that time Mayor Lindsey put together the specifications for the job and made those eligible for the rank of Warden to take the examination. The position entails a great many areas, but I can just touch on a number of them.

As I said earlier, it requires coordination between the institutions, that of overseeing.

THE COURT: If I understand you, you coordinate and you supervise the activities on Rikers Island, and only on Rikers Island?

THE WITNESS: That is right, your Honor. Each individual Warden still is responsible for the maintenance and housekeeping and control of his own institution. My command provides a service generally. We are in charge of the transportation of equipment, vehicles. We are in charge of the bridge operation and its activities; we are in charge of communications; we run the maintenance program on the Island. We run the production lines and manufacturing facilities, the laundry, the bakery, just to mention a few. We provide those nessary elements. If we have any confrontation or anything unusual in the Department my men as a group have been trained to provide assistance.

We have a number of fire engines which come under our command which are made available prior to the response of the New York City Fire Department. We provide all of the outside security, and, then, what I consider quite important, why the job was proposed, I am responsible to assist various agencies in their work with outside contractors in the planning of new institutions and as to modifications of existing buildings, that type of thing. So it runs into that gamut. We are a service organization. We do not directly oversee in those activities, such as medical, court appearances, and so forth. That is their own responsibility. But we supply them with supportive services.

THE COURT: It sounds like an interesting job.

THE WITNESS: Quite interesting and quite much of a headache.

Q For the record, Warden, are you the senior uniformed officer in the Department?

A Yes, sir, I am.

Q Getting to some of the issues that we are dealing with specifically here, how does a visitor arrive using public transportation to Rikers Island?

A Well, I think if the Court permits I would like to explain the visiting process for inmates is related to

not just one institution, it is related to all of the institutions there. So we are faced with a total overall problem of screening and processing.

THE COURT: Both out of fairness to yourself and myself, I have now visited Rikers Island twice and I have gone across the bridge and cleared those security arrangements. I have gone through the visitors building, or whatever you call that building, and cleared those arrangements, and in my case I have gone to the House of Detention for Men and signed in there. I would like a complete description of the situation from you so I can relate the problems that the House of Detention for Men has to the overall picture.

Q Let's start from the initial point.

When an inmate visitor takes public transportation and arrives at the Island, where does he go? What happens?

A With your permission, if I can explain the fact, there is a problem dealing with just not that one institution. We have to take into consideration that the visiting program involves a number of other institutions besides the House of Detention for Men. So when I refer to visitors, it is a broad term, and then I can redefine it if you so desire as to how it relates to the House of

Detention for Men.

The general visiting program makes allowance at the bridge collection points and bridge control building to provide processing and control for inmates not only for the New York City House of Detention for Men, but for the New York City Adolescent Reception Detention Center, which houses 1008 adolescent boys 16 to 20 years old.

THE COURT: They are all boys?

THE WITNESS: Yes, sir, they are, your Honor.

Then we have relative to that type of institution which I just referred to the New York City Adolescent Detention Center, and this institution houses a group of adolescents which we call the overflow of approximately 800 inmates. It also houses in one section of its building approximately 150 mental observation cases, who are adults from other areas with in the City departments.

THE COURT: Is there any difference in the character of behavior of the adolescents at the first institution from the overflow institution?

THE WITNESS: Not too much, except they are screened at the reception center first and it is felt that those who would be there for a longer period of time in terms of court appearance would then be transferred to the Adolescent Detention Center.

THE COURT: That is the second institution?

THE WITNESS: That is the second institution, your Honor. So that describes two of our institutions.

The third institution is known as the New York City Correctional Institution for Men, adolescent and adult. This is a sentence institution which is primarily a dormitory-type institution, not a cell-type institution. They are open dormitories, of which there are 27. This houses the men sentenced, both adult and adolescent. Their population runs approximately 1300 to 1400 at the present time.

The fourth institution is the New York City Correctional Institution for Women. This institution contains females adult and adolescent sentenced and in detention. These are all female inmates who have been arrested, arraigned, and held, as well as a certain number of Federal detention inmates.

THE COURT: We will relieve you of those soon. There is not that many.

THE WITNESS: It is negligible right now. And, of course, we have in addition to that the Rikers Island Hospital, which has a capacity of about 250 or thereabouts. This houses both a mental observation-type of inmate, as well as a chronic-type of illness, and, of course, we have

in addition to that a large number of supplementary organizations and services which are part of the headquarters, and where I have my office. These are not housing areas for inmates, but they have a relationship to visiting and bridge operation, because it involves hundreds of employees who provide supplementary services in terms of production what I mentioned earlier in my statement to the institution.

Finally, and last of all, we have the administration and dispatch office for our transportation division on Rikers Island.

THE COURT: Is that for the whole Correctional Department or just for headquarters?

THE WITNESS: Yes, at the present time, your Honor, it is the administrative office, but we are in the process now of completing right behind my particular office a central auto service and repair shop, which means we will be closing off our garages in Brooklyn within this year and removing that entire staff and fleet and operation, which we hope will be of great benefit to the Department on Rikers Island, because that is where a great majority of our court cases are emanating from.

We also have under construction at the present time the C-95 Supplementary Housing Service at Rikers

Island. That construction is going on for two separate institutions, one with 768 beds, 12 dormitory-type institutions for inmates, and a separate wing of 248 beds for mental observation cases on Rikers Island.

THE COURT: What kind of inmates will be in the first?

THE WITNESS: There is not any question under present conditions they will be detention inmates. The C-95 project will provide separate services for both institutions. They will have their own visiting areas, their own kitches, their own mess halls, their own recreation areas, gymnasiums, auditorium, chapels and so forth, so that the House of Detention for Men will no longer have to share any service with any other institution, and that is one of the reasons we have pushed so hard.

THE COURT: I know they share the gym. Is that one of the things they would not have to share any more?

THE WITNESS: That is right.

THE COURT: Do you want to specify what that will share?

THE WITNESS: The visiting house is now shared by the House of Detention for Men and the Adolescent Detention Center. That is the institution I mentioned

before which was the overflow institution for adolescents. Now the House of Detention for Men and the Adolescent Detention Center must share both that type of recreation service, the gym, and one of greater interests, of course, is the visiting house. They both use that area. We have to program it in such a manner so they do not conflict. This will be eliminated by the new construction.

THE COURT: When do you expect to see the C-95 completed?

THE WITNESS: That depends on many things, including the availability of material. With in two years.

THE COURT: Will it be that long?

THE WITNESS: I would say probably about two years. That is a fairly long range estimate. I would rather estimate it a little longer than giving a time earlier than that and not meeting it.

Now, if I could answer your question. I hope I didn't go into too great a discourse?

MR. TOBIAS: I am glad you gave the Court the description so the Court could have a scope of the visitors coming to the different number of institutions on the Island.

Q Now specifically I would like you to take us through the first step.

What happens when a visitor comes across the bridge on a bus?

A There are a number of methods by which visitors can approach Rikers Island. The major method of transportation is using the Steinway Transit Corporation bus, which is a public transportation system. They operate the Q-101 bus. It emantes from 59th Street and Second Avenue, and it taiks about 34 minutes for this bus to reach Rikers Island proper.

It touches upon the major arteries and the major subway stops, including Queens Plaza and so forth, and eventually ends at Rikers Island. This bus stops at 20th Avenue and Hazen Street, and the course of that bus from that point is 2.2 miles to the bridge control, and that is underwritten by the City of New York in terms of paying the bus company.

THE COURT: That does not relieve the passenger? It would be more expensive then?

THE WITNESS: There was not any other method. The franchise is one where we had to negotiate with the Steinway Transit, and I don't know the answer.

THE COURT: Do you know whether the Steinway franchise would prevent the City running a free bus?

THE WITNESS: Yes, that's the purpose of the

franchise control. We looked into that back in 1965. So I say the people, the majority of the people can come across directly by bus across the bridge to the bridge control booth. That is one method. If they arrive in their own private car, of course, we don't permit the vehicle to cross the bridge. They must park on the Queens side and then take public transportation across the bridge. A bus stop is provided at the corner of 19th Avenue and Hazen.

There is a third method which some visitors do come by, and that is by the use of a taxicab. We made arrangements so that taxicabs can be registered before they come upon the bridge, and they are given a windshield ID and they are permitted to drop their fare at the bridge control building.

Now, visitors to the various institutions because of the staggered hour system and because of the logistics involved, some of our visitors begin arriving, for example, at the House of Detention for Men as early as 9 o'clock in the morning.

THE COURT: Are they staggered with regard to institutions?

THE WITNESS: Yes. So some of these people may arrive as early as nine in the morning. We don't

permit them to cross the bridge that early, but they do come across within a short space of time, I would say closer to 10 o'clock.

Q Warden, I would like you to explain the physical setup of the visitation control area and what goes on in that area?

A The first checkpoint, as we call it, is this construction control trailer, and its name denotes its primary purpose, because in addition to employees and inmate visitors, authorized visitors, counsel and so forth coming across, we have had for many, many years an extensive construction program going on at Rikers Island, so we do some preliminary screening at the construction control trailer for contractors' delivery trucks and so forth coming on to the Island. That is the first checkpoint. The Queens abutment, as we call it, is the checkpoint at the foot of the bridge which merely verifies the type of identification that is now made available for persons who are permitted to drive across the bridge.

When we get to the Rikers Island side it is necessary to have another checkpoint, which we call the Rikers Island abutment checkpoint.

You have three parking fields, and cars have to be diverted into those parking fields. The man checks

those persons who are authorized to come directly on to the Island, so that the person who may have a vehicle or a truck is authorized to go to either Gate 1, which is used for Correctional employees, et cetera, or to go to some other gate, and so forth. But the passengers that we speak of who are inmate visitors approach through a kind of kind of traffic circle arrangement we call the Pork Chop, which drops these people directly in front of the bridge control building. That is a very new building.

THE COURT: That is the building where the visitors check in?

THE WITNESS: Yes, and it is laid out in such a manner that they come in a set of doors, and as they come in, they are given a number, and they are called up to the particular window at the institution they are visiting. This is done in such a manner so they can be seated in orderly fashion, and later on they will be called up by numbers to the window of the particular institution they are going to visit.

THE COURT: How old is that building?

THE WITNESS: We opened that building in October of '66, your Honor. So it is comparatively new and it is on an airport waiting room style. It is rather a nice building.

THE COURT: Yes, it is a nice building.

THE WITNESS: These people are then called up to the window to identify themselves and so that the institution to be visited can be made aware that John Jones is being visited by Mary Jones. Otherwise, there would be no way of knowing who is visiting whom. These names are then called over a telephone to the institution so that they can prepare to make the necessary arrangements to pick up the inmates from their housing area or from their work areas, or from the mess hall areas, anywhere they may be in this particular institution, and they are gathered in such a manner to be able to meet them in that institution in the visiting house.

After they have been identified they are given a tag, an identification tag, which relates their name to a number, so that they can carry the tag on their lapel or person, so one can see that they have been registered properly and are ready to be transferred to the institution concerned. They are then transferred, and after that point, after they go in the waiting room, they become the responsibility of each individual institution.

Q Warden Buono, I would like you to explain to the Court what activities go on at Rikers Island in the early morning hours, such as 8 and 9 o'clock? I would like you

to try to give the Court an understanding as to any possible interference in the visitation process.

MR. BERGER: Objection. I think this is getting admittedly leading.

THE COURT: I don't think we need to be coy about this situation. I don't want you to suggest problems. On the other hand, let's put it this way:

What is the relationship of the activities that occur in the early morning hours on the Island with regard to the visitation process?

THE WITNESS: I think it be best to explain that there are three major basic tours of duty which our custodial people have to perform. The heaviest work tour is usually our 8.30, or maybe depending on the institution, 8 o'clock to 4.30, or 8.30 to 5 tour or duty, and this is overlapped by what we call a 4 to 12 and a 12 to 8. Between the hours of 7 a.m. and thereabouts and about 9 a.m. we have a tremendous amount of employee traffic both custodial and civilian.

THE COURT: And civilian, did you say?

THE WITNESS: Civilian, we call them civilians, not derogatory, but as a contrast to our custodial people. In other words, we are talking about clerical people, people in terms of housekeeping activities, medical people and so

forth. This requires a tremendous amount of processing, mainly for identification, because all of our employees have identification cards or a shield. They must be processed through that bridge control building.

THE COURT: Through the bridge control building?

THE WITNESS: Yes, sir, everyone has to get processed. It is still a prison and an extension of our security system. We have three parking fields for the benefit of our employees. The west field can park 500 cars, the east field can park 350 cars, and the east field No. 2 can park 150 cars. I am talking about any one given time we will have at least a thousand cars on Rikers Island with their passengers who have to work. This has to be related to traffic through the bridge control building between roughly 7 and 9, even a little after 9. So we cannot have too many inmate visitors or any other type of visitors while this is going on. Notwithstanding, at the same time there are approximately 200 to 250 trucks and delivery vehicles coming on to Rikers Island in the form of contractors and so forth, who are now coming to work between 7 and 8 through our Fate 4. Also, through that same area, although they do not pass through the bridge control building, but they go through Gate 1 or all of our Transportation Division vehicles that are taking inmates

from the various institutions off Rikers Island to the various courts in the city.

So I don't know if I need go any further than that. We do have a tremendous amount of problems in terms of vehicles and primarily in terms of employee identification.

THE COURT: How many people work on the Island?

THE WITNESS: I would estimate well over 2000, your Honor.

THE COURT: Do more of them work the 8 to 4?

THE WITNESS: Yes, I would say about 4 to 1, your Honor, the larger amount.

THE COURT: 50 per cent of the total?

THE WITNESS: More than 50 per cent. I would say closer to 60 per cent of the total.

Q Do you know with particular emph asis towards uniformed personnel is there a tour change at 8 a.m.?

A Yes, the midnight tour goes off at 8.30 in the morning generally, so that one group of officers who are still on the Island are given leave by the 8 o'clock tour. So you have this period of one group coming on, another group going off. These are not the only tours of duty. We have split shifts which number at least eleven additional tours, depending on the institution, 5 a.m. to 1 p.m.,

1 p.m. or 1.30 p.m. to 9 p.m., or even 2 to 10.30, 11 to 7.30 p.m. I can go on and on. But there are split shifts.

In addition of these, there are shifts that are put in by each institution to try to meet the impact load time of a certain service, be it feeding or recreation. So they put in supplementary tours, your Honor.

Q Getting back to the activities at the bridge control center, could you estimate about how long it takes for inmates to be processed at the bridge control center? We're not talking about the activities of the institution. We're not talking about the institution right now, just at the bridge control center.

A Well, I think you would have to take it at certain times of the day. I'm not trying to evade the question. I would like to clarify it again, that one institution, again the House of Detention for Men, has a visiting program that for the bridge control building starts at 11, the institution, I believe, starts at 12 or thereabouts, so we have to start that processing as early as 9.30 or close to 10 o'clock. People begin moving across the bridge in terms of the Steinway Transportation or private vehicle. They have to be processed in terms of first come, first served. So we give them a number.

It is like a ticket. It takes roughly two hours for us to move them.

THE COURT: Starting at 9.30?

THE WITNESS: I would say about that, starting at 9.30, and it is not much before 11.30 that that first group can start moving up to the institution, and there is a problem of logistics there. A large group of people will usually hit us at one time because the same thought is there, "I will get there first."

THE COURT: It does not make any difference?

THE WITNESS: No, it does not really.

THE COURT: You don't have a shuttle system?

THE WITNESS: After the first two loads, but the impact time is what regulates how fast we can move them out of them there.

THE COURT: I know you have a limited amount of trucks or buses, so you can't run a special bus for every single person that comes.

What would prevent you, for example, if the first 30 visitors arrived at 9.30 from clearning them by 10 and sending them on?

THE WITNESS: Well, the institution, your Honor, I think I have to relate it now, at the institution they have problems within administrative areas concerning the

type of servicing going on at that time. For example, if we moved the inmates earlier than 11.30, say 12 o'clock, let's take the House of Detention for Men, that institution is in the process of getting inmates out to Court. That is the first problem we have to concern ourselves with early in the morning. Then they have a certain amount of time where they have to go through a sanitation process within each little housing area, and although it is a short space of time, it must be done for hygienic reasons. They these inmates are let out, and before long, about 10.30, they are preparing to move them to the day rooms for feeding. And feeding in my number of years in the Department has always been the most primary and basic area which a Warden must concern himself with.

I think frankly everything else becomes secondary. Unless we have a good feeding system the food is kept hot and the men get it at the appropriate time, speaking of the inmates. So if we have any area we concern ourselves with, that is it. We would not want to interfere with that program.

THE COURT: You say it is a problem for the institution. It's like getting the beds made ready in a hospital, and things like that.

THE WITNESS: Yes. Another point I have to

make here is we have to take into consideration the logistic type of move to get one inmate from one area to another. So even if we did have visitors brought to the institution prior to 10 o'clock or 10.30 or whatever it may be, first of all, we would not have sufficient space in the visiting house to handle him as he would like, and they would just like to sit there.

It would not make too much difference whether they sat on the bridge side or in the waiting room of the institution. But in all fairness to the institution, they could not possibly handle that visiting program much before 12 o'clock.

Q Warden, in your experience when visiting hours are announced when do the inmates generally start arriving? How much before the stated hours generally do they come?

A You mean inmate visitors?

Q Yes.

A There is a problem I don't think we will ever cure. We post information that the hours are from 12 to 4, taking one institution, or in the evening from 5 until 8. I will concentrate only on these House of Detention for Men. I hae groups of people who come in in the afternoon. Now, the Adolescent Detention Center and the women's institution, their hours actually do not

begin until 5 o'clock. Agaain, that same type of reasoning, feeding period. These people arrive at the bridge side at 2 o'clock in the afternoon. They come from the Queens side. They come out of there at 1 or 2 in the afternoon. They do come from one to three hours prior to the time they know they can get into the building.

THE COURT: .I suppose to some extent that is an advantage. You would want a certain spread of time in order to process people?

THE WITNESS: Yes. There is not much we can do about it, because these people feel the sooner they can get there the sooner they will visit, so we process them within a reasonable length of time.

Q Warden, in order to insure that everybody who comes to the institution during the stated visiting hours in fact gets to visit, how many visitation periods generally do you have? Let's talk about the House of Detention for Men?

A The House of Detention for Men, I recall, has at least three and possibly four.

THE COURT: I take it you're going to present me with some kind of schedule I can look at?

MR. TORIAS: Warden Thomas will present that visitation schedule.

Q Is it the policy of the administration at Rikers Island to see that the people who do, in fact, come to the visitation area within the prescribed time get to see the inmates they intend to visit?

A Yes, there is no question about that. I would not be telling the truth if I did not say we do turn away people who may be intoxicated or create a disturbnance at the bridge control building, which is the same as any public building.

THE COURT: But putting aside those instances with which the plaintiffs, I am sure, would agree with, am I to understand that if a well behaved, properly behaved visitor arrives within the processing time, whatever that may be, he or she is guaranteed to see the person he came to see?

THE WITNESS: Yes.

Q Do you know how long a visit s at the House of Detention for Men?

A Their visits are one-half hour apiece.

Q Warden, do you know whether or not the visitation process at the house of Detention for Men has been running past 3 o'clock in the afternoon?

A Yes. That problem has now become very evident during the month of December.

Q Why is it a problem?

A Let me if I can explain this matter.

Prior December the overload from the Manhattan House of Detention of course did not evidence itself at Rikers Island as much as it does now, but with the closing of the Queens House of Detention for Men and with the concentration of the methadone detoxification inmates, the additional personnel who have now been assigned to Rikers Island because of the additional inmates coming to Rikers Island, whereas in the month of November prior to the closing of those other institutions the bus count ran around 20,000 some-odd figures, it went up as high as 31,000, or an increase of 55 per cent in that one month.

Q That is, visitors?

A This is visitors and certain employees, too. The visitors' proportion went up quite a great deal because what has now happened the visiting area that is being used in the afternoon hours by the House of Detention for Men should be cleared no later than 3.30 or, at most 4 o'clock.

THE COURT: Visitors should leave by that time?

THE WITNESS: We have to really have to have them out of there, your Honor, because of two basic reasons, the first that the next institution, the Adolescent Detention Center, must put before 5 o'clock.

THE COURT: You are talking about --

THE WITNESS: The Adolescent Detention Center, that is, the overflow institution.

THE COURT: Let me get this straight now. I have visited the visiting area at the House of Detention for Men. Are you now saying that that visiting area at the House of Detention for Men is also used by the Adolescent Detention Center?

THE WITNESS: That same area has to be taken over at approximately 4.30 that afternoon so that evening visits can be processed for the Adolescent Detention Center.

THE COURT: The visitors to the adult inmates have to get out?

THE WITNESS: Yes. That is the first probelm.

The second problem is that there is a custodial change of tours that has to go on at 4, between 4 and 4.30, so that the day tour of custodial officers have to be relieved by the 1 2.30 officers. That entails a count of the entire inmate population wherever they may be. So now we get involved in the administrative problem of two institutions. One institution is waiting to move its staff in and the House of Detention for Men has to move inmate visitors out, and at the same time a count has to be made of the total inmate population. So it has been a

problem.

I know Warden Thomas and I intend to have a meeting this week with Warden Greco, who runs the Adolescent Detention Center, to have a meeting to coordinate some type of situation to more or less contend with this problem.

Q What happens at 4 o'clock? Does the visiting stop?

A No, the visiting has to continue. The inmates then have to be counted individually wherever they are and that is relayed to the control room. That is what has to be done.

Q Has this process pushed up the time that the Adolescent facility is able to receive visitors?

A We are still processing the adolescent visitors at the bridge control building, but we cannot move them out of there, or we have not been able to move them out of there at 4.30. We have to hold them back to a degree, which again causes a problem.

Q Is it the policy that the last visitor to the House of Detention for Men has to be out of the area before they bring in visitors to the Adolescent Detention Center?

A Yes.

THE COURT: I don't understand why that has to be. You don't want a general intermingling,but, after all,

the character of the visitors may be very much the same, they are pretty much the same.

A There is one basic difference, if I may, and that is that at the bridge site there's a problem as to who is leaving, who is coming in.

Q Warden, do you know how long the adolescent visits have been running?

A As a result of this so far our adolescent visits for both adolescent institutions, not only the Adolescent Detention Center, but the other one, some are on the Island as late as 10.30 p.m. before we can get them off.

Q You stated there are sentence institutions on Rikers Island. How much visitation time do the sentenced inmates get?

A The sentenced males get on hour on a Saturday or a Sunday during the daytime. In other words, it is between the hours usually of 9 to 12 and they are permitted one hour of what we call a juvenile visit on Monday night. That is when the visitor is permitted to bring a child to the Island and visit the sentenced inmate, on a Monday, as all inmates are permitted juvenile visits.

THE COURT: Must there be a child?

THE WITNES: Yes. We felt that it was rather important for the family to have that one visit.

THE COURT: I think it is fine.

Q So, Warden, I take it then that if a sentenced prisoner does not have a child that wants to visit him he will have one visit a week?

A One hour a week, yes.

Q What attempts do you make to stagger. You alluded to this bridge. What attempts do you make to stagger visiting hours so the bridge won't become crowded? How do you treat different institutions on an hourly basis?

A Well, we have a system set up so that the House of Detention for Men as far as the bridge control building is concerned, usually you would go back one hour. We have set up visits at the bridge site processing from 11 to 2 for the House of Detention for Men. From 1 to 3 that same afternoon we process inmates under the methadone detoxification program in different institutions. By doing it from 1 to 3 we find that the overload has now passed the bridge control building and it starts to slack off at 1. Then we permit visiting from 5 to 7.

THE COURT: At what institution?

THE WITNESS: 1 to 3 at the methadone detoxification. So that is the second institution. Then from 5 to 7 we have visiting for three institutions at night, that is, both adolescent institutions and the women.

Now, the women have certain selected hours in the afternoon. There is not too much time at all. We have certain detention inmates in the afternoon who can be visited as well. In addition to that, every Saturday and Sunday alternatively these institutions have hours. Some are from 9 to 12 and some are from 1 to 3.

The hospital on Rikers Island has two visiting periods. Their visits are rather light. We permit them to visit between 11 and 2 and 5 and 7, because their work load is not as great as the other institutions. So that, actually, we have visiting seven days per week and five nights per week going on continually.

Q Warden, is assigning personnel what efforts have you made to facilitate the visitation process?

A Well, that is a rather touchy subject, but I think it is a very important type of consideration I have to make. When we opened the bridge control building in 1966, here we suddenly exposed the whole Island, which no longer was an island, it now became a peninsula.

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THE COURT: What was your job?

THE WITNESS: I was not the Supervising Warden; I was the Warden for the New York City Correctional Institution for Men and at that time the bridge operation was still under my supervision. I was in charge of con-

struction and security, so the job was always mine. So when we opened up the bridge I had to take into consideration that no longer was it an island that could only be reached by ferry, but with the fact that it now became a peninsula because of this bridge.

THE COURT: Marshal, have you got the witnesses with you?

THE MARSHAL: Yes, four of them.

THE COURT: Bring them in.

MR. HERMAN: Could Mr. Benjamin sit here at counsel table?

THE COURT: Yes.

THE WITNESS: (Continuing) So we had to make a rather broad kind of survey as to what type of officer we would assign there, and it was the purpose of having people who were stable, who had some experience in the Department, and who knew the means of processing people. I selected some people who had a Spanish-speaking background and I also assigned them to steady tours, so most of these officers worked those tours on a steady basis, meaning the primary post of 8 to 4.30, or 4 to 12.30, et cetera.

Most of these men have been there since 1966, notwithstanding all the problems that they have had and the type of exposure they have had to contend with, many of the

problems they have had to contend with in the area, such as the frustrations of people not being able to get what they thought they should be getting. I found them to be fulfilling their job very well. I kept these men there for almost eight years now.

Q What types of security problems have they been faced with?

A Well, we do have the exposure to people attempting to bring in concealed weapons; you have a narcotics problem there; you have the fact that many of them will come along with not only whiskey bottles on their person, but being openly held in their hands. You have large numbers coming to visit one person knowing that only one individual can visit. We have to try to control that problem. There is the searching of vehicles that has to be contended with; the fact that there is also a possibility of any kind of a mass assault on the area. You read enough of the newspapers to know a great many things can happen. So these men are exposed to quite a number of problems in terms of security.

Q In your experience as a Warden, that is, as head of an institution, are there any problems in getting an inmate to go on his visit when the visitor shows up?

A I would think since we have the first-come-

first served policy it has made some difference. Before they had to record with us the person or persons who were authorized to visit. That has been removed, so any person can visit any time.

At times we are exposed to a situation where they don't care to visit this person or want to know who it is, and when they get in a booth they get up and turn around and leave. There are some people who would rather continue what they are doing for a period of time, such as working in the gymnasium.

THE COURT: What is the relevance of this to our problems?

MR. TOBIAS: I want to show the many factors that account for the fact that the visiting process is a time consuming process.

THE COURT: It doesn't take any more time, does it?

MR. TOBIAS: When the inmate is recalcitrant it may or it may not take any appreciable space of time more, but it is something I think the Court should consider.

THE COURT: All right.

Q Warden, moving on to the area of recreation --

THE COURT: If you are going to move on to that

area, which I think is important, it may be a good time for us to take a short recess.

(Short recess.)

THE COURT: I think we were about to talk about recreation.

BY MR. TOBIAS:

Q Warden, are there any outdoor areas adjacent to the House of Detention for Men that are specifically constructed for utilization by detention inmates?

A Yes. Since the House of Detention for Men was converted to a detention-type structure we built four outdoor recreational areas. When I use the word "outdoor," it is because of the fact that we utilized the area between the cell blocks and converted them into either a combination of black top or concrete areas, and there were four areas as such.

The most recent one was the 1-B segregation area. There are three others besides that.

THE COURT: So that means bearing in mind that there are only about a dozen people in 1-B, which I know because I have another case pending before me that has to do with that, we are speaking about three recreational areas for the bulk of the population.

THE WITNESS: Yes.

THE COURT: You have about 1350.

MR. TOBIAS: We have over 1500 today.

THE COURT: Can somebody specify what the size of those recreation areas are? I did see them.

MR. TOBIAS: We can get you the figures. I don't know that Warden Thomas has them with him.

THE WITNESS: They vary, but if you take the distance between the cell block, 100 feet.

THE COURT: The average is about a hundred by 150?

THE WITNESS: I could be off. We had to take into consideration some of the abutments that came out in those areas that would cause one size to be a little different than the other.

THE COURT: But that is approximate?

THE WITNESS: They don't run the total length.

Q Do these areas have security features that are built in?

A They contain mainly a fence at the ends and one controlled gate door which goes out from the day room area. The other security feature, of course, is the use of the correction officer who may be on duty in this area.

Q Warden, there are certain open fields on Rikers

Island. I would like to know what use has been made of them in the past?

A Well, there are two remaining large ball fields on Rikers Island. I use the word "two remaining," because a third one was demolished to make room for the new C-95 project that I mentioned earlier.

THE COURT: You mean in the sense they actually have been developed for us as a ball field or they could be?

THE WITNESS: The larger field was built primarily for baseball, use of baseball or softball, and each of them had a number of bleachers built in them because the participation was in good part observance of some of the ball games between housing areas or for outside ball teams. It has a section made of or built for some basketball courts and shuffleboard courts. But keeping in mind these fields were originally built in a sense for inmates, a good part of the total population would be put out on to the ball fields on weekends and later on we had a smaller amount of them put out, detention inmates.

The purpose for building the smaller field is we have had to put a smaller amount of people in there.

THE COURT: I am a little confused. When you say a smaller field, you mean --

THE WITNESS: The supplementary fields we built

since then, your Honor.

THE COURT: I know that there are these recreation areas between the cell blocks.

THE WITNESS: Those are the ones we use now.

THE COURT: In addition to those and whatever there may be at other institutions, there are two large ball fields on the Island.

THE WITNESS: One for the sentenced inmates at the Correctional Institution for Men.

THE COURT: It is actually used by them?

THE WITNESS: Yes, it is used by them.

THE COURT: There is, as you referred to earlier, construction to add to the recreational facilities?

THE WITNESS: Yes, the C-95 project will make additional indoor gymnasium space which would relieve the House of Detention for Men from sharing theirs. They also will have outside recreational areas built. This new concept pertains to all our detention institutions, the ones we just recently opened up, which include both the women and the Adolescent Reception Detention Center. All of them have this new area.

THE COURT: The new C-95 complex, as I call it, will include outside areas for recreation, as well as an additional gymnasium?

THE WITNESS: Gymnasium and chapel.

THE COURT: I understand how the addition of the gymnasium will relieve the House of Detention for Men, because they presently share theirs. Will the addition of new outside areas under C-95 have any impact on the House of Detention for Men?

THE WITNESS: The new institution will then have its own recreation area.

THE COURT: At the present time the House of Detention for Men is sharing its gymnasium with somebody, but it is not sharing its outside facilities?

THE WITNESS: No, but I might add this, your Honor, we plan on building additional smaller recreational areas for the House of Detention for Men between the blocks.

THE COURT: Will you tell me about that?

THE WITNESS: Well, this time of year is not suitable for that type of construction, but there is not any question that come the spring we will start to build a number of additional areas in the cell block areas of the House of Detention for Men.

THE COURT: Have you any idea how many that will be?

THE WITNESS: We figure on two more at the present time.

THE COURT: How long does it take to create those once the weather is good?

THE WITNESS: I would say three months or less, probably less. I would say about three months or less.

MR. TOBIAS: No further questions.

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CROSS EXAMINATION

BY MR. BERGER:

Q Good morning, Warden. Pleased to make your acquaintance. I am Joel Berger; I am an attorney with the Legal Aid Society.

I met you several years ago in the Criminal Appeals and you once gave me a tour of the reformatory and I am sure you don't remember me.

A No; I don't.

Q Warden, you ran down the names of the different institutions on Riker's Island and I was wondering if I could get some idea of when these opened up.

The one that is now called the House of Detention for Men is the oldest building there, isn't it?

A They started to build that in 1933 and it was opened in 1936.

Q For a long time that remained the only institution on the Island?

A When I worked there, it was called the New York City Penitentiary.

Q When did the next institution finally get opened up there?

A Well, I think we would have to say that the penitentiary had a number of additional phases built to it

jbesb-2 Bueno-cross

before we hit the next -- in other words, we kept expanding it and --

THE COURT: You are talking about the building, now, the House of Detention for Men?

THE WITNESS: Yes.

A (Continuing) And the first institution that was built was then identified as the New York City Reformatory and that was opened in 1961. That is now identified as the Adolescent Detention Center, 12-12 Hazen.

Q And that opened in 1961?

A As I recall, it was 1961.

Q The House of Detention is 14-14 Hazen?

A Correct. Do you want a notation of this while we are at it or do you want additional questions?

Q I'll ask you.

After the Adolescent Detention Center opened, what was the next one after that?

A The next was called -- the original name was the Reception and Classification Center for Men, now called the New York City Correctional Institution for Men; Adult and Adolescent Division. That is 10-10 Hazen.

That was opened in 1962, through 1963. It was a phasing process. I'll have to say it didn't open up in one phase, one day, because it began to take over certain

processions over a period of a year.

THE COURT: That is the institution for sentenced people?

THE WITNESS: Yes, sir. It has always been used as such because the design was more or less that type of design; created for that purpose.

Q Just to go back a minute, the hospital that was called the Riker's Island Hospital and essentially is connected to 14-14, when did that open?

A At the same time as the New York City Penitentiary. It was an appendage to that institution; yes.

Q Then you got these two very new institutions, right, which you call ARDC and the Correctional Institution for Women?

A For women.

Q What is the address of ARDC?

A 15-15 Hazen.

Q And the Correctional Institution for Women?

A No. I'm sorry. ARDC? That is 11-11. The Women is 15-15.

Q Both of those opened in very recent years?

A Yes. One opened in 1971.

Q Which was that?

A The Women? That was in June of '71.

jbesb-4 Buono-cross

Q And the ARDC?

A '72. June of '72.

Q The bridge which so radically changed the problems of the Island, that opened in what year?

A October of 1966.

THE COURT: Did you get there by boat or what?

THE WITNESS: Ferry from 134th Street in the Bronx; a ferry from that section, across to the northern end of the Island, your Honor.

THE COURT: Some people have raised the question as to whether Riker's Island is in the Southern District of of New York but it is --

THE WITNESS: Still in the Bronx.

THE COURT: -- still, logically, part of the Bronx.

THE WITNESS: It is still the Bronx, your Honor; still is.

Q Now, just to finish, go along with the history here, when the bridge opened around '66, isn't it at that time that the City began to look into how to provide for bus transportation over the bridge?

A Well, we did it before that. We did it -- when I say "the City," it was part of, actually, the Department of Correction had them initiate the direction in which we

had to proceed because there wasn't any transportation to that area up to just at 20th Avenue.

I think I mentioned earlier in my statements this morning, the Steinway Transit used to come up to Hazen Street and 20th Avenue.

Q Didn't run past there?

A Didn't come near the section.

Q Not a heavily populated area?

A Well, it's strictly residential and some factories in that area.

Q So, the City entered into a franchise, agreement with the Steinway Transit Corporation?

A To extend an existing line.

Q What is the fare on that line?

A Thirty-five cents, as of today.

THE COURT: No matter how far you ride?

THE WITNESS: That's right -- from 59th and Second Avenue to the termination, which is at the Bridge Control Building.

THE COURT: Warden, as long as I am talking, I would like to ask you a couple of questions about the bridge which are not vital but which are significant.

How long is the bridge, if you know?

THE WITNESS: Eight-tenths of a mile.

THE COURT: How many lanes of traffic?

THE WITNESS: Three lanes, your Honor.

THE COURT: Thank you.

Q One of those lanes, however, is not used by general vehicles?

A We hope it doesn't get used for general vehicles. That is a fire lane and if two vehicles coming in opposite directions reach the high point of the bridge, we have a catastrophe.

But we have to use it in time of repairs, which we do. We are in the process of painting the 20-inch main coming across and supporting services, so we have to close off one lane so we have to have three lanes.

Q You stated that if the City were to run additional buses to Riker's Island, that would violate the franchise agreement.

A I would rather you didn't take me that literally. I am saying that there is a franchise that is issued to various private transportation bus companies throughout the City. One of them happens to be the Steinway Transit, affiliated with the Queens Transit.

That section of Astoria, I guess you call it, has been franchised to that area. There is never -- there usually is not a type of overlap between the bus companies

for that reason. After all, they make investments and I can't go into the mechanics of that.

Q The part of the Steinway line that runs past 20th Street and out to Riker's Island, that is subsidized by the City, isn't it?

A Yes, through the Department of -- subsidized for the Department of Corrections by the City.

Q You don't have any reason to believe that Steinway would want to keep the run between 28th Street and the bridge. You said it is sparsely populated.

MR. TOBIAS: Objection.

THE COURT: Sustained. I don't see how the Warden would know.

Q Do you have any familiarity with when this franchise agreement expires?

MR. TOBIAS: Objection.

A I know what the terms of it are. I know what the cost --

THE COURT: I think I have indicated at our conferences that I don't believe the Court can or has the authority to go into the question of bus transportation to Riker's Island, although I am interested in what was said and I think to give me a rounded picture for whatever the Warden wanted to bring out, it is perfectly all right to get

the full facts.

MR. BERGER: Very well.

Q Now, when the bus comes over to the bridge, does it have to stop at the Queens side?

A The bus is -- the Q-101 Bus, which we are speaking of, is Steinway. We have a great many buses coming across the bridge. We are talking about the Q-101 Steinway Transit.

It stops at the Construction Control Building for a very cursory check and particularly in the afternoon. That is, we don't permit a certain number of visitors over that bridge until three o'clock. But, otherwise, it isn't --

Q Which visitors are they?

A The people who visit the evening institutions.

THE COURT: You mean you won't permit more than a certain number?

THE WITNESS: No. None of them cross until three. I think I mentioned earlier, your Honor, if you recall, because of the overlap, that we have to control a certain amount of people.

THE COURT: What happens then? Somebody goes on the bus and until you show that you work on the Island, you have to get off, or what?

THE WITNESS: They get off and there are very few

of them. Just a few. And they get on the bus. The buses that are coming across after the three o'clock schedule, there is no charge. We made that arrangement.

THE COURT: Where do they wait in the meantime?

THE WITNESS: Well, there were two trailers we had but they were demolished, vandalized.

THE COURT: Too bad.

Q If somebody drives to the Island, an ordinary visitor, family member or friend, and they arrive at the bridge, just what happens?

A They arrive, they are checked, they arrive at the Construction Control Trailer, the first check point.

From there, they are told to park in a field which is on the Queens side, a parking field on the Queens side of the bridge, right adjacent to the Queens abutment, and from there, they have to take the public transportation across, the Steinway.

Q So they have to wait there until the next public transit bus comes?

A Yes.

Q And they pay the fare?

A Yes.

Q Just to get over the bridge?

A They do.

Q Cabs can cross the bridge, I believe you said?

A Taxicabs are permitted to come across the bridge. They stop at the Construction Control point, certain information is transmitted to the officer on post, it is put in the log, he is given a windshield card, he is permitted to take the fare across to the Bridge Control Building, drop the fare off and he must leave the Island.

Q That same procedure, the first part that you described, also would apply, let's say, when an attorney comes to visit, is that correct?

A Yes.

Q Gets an identification card, is that right?

A That's right.

Q In addition to the control point where you get the identification card -- what is the name of that point again?

A Construction Control Trailer.

Q That is where an attorney --

A That is 19 and Hazen.

Q That is where an attorney gets out and identifies himself and receives the pass?

A And eventually he is registered in the Control Building.

THE COURT: As you are starting across the

bridge?

THE WITNESS: Yes, your Honor.

Q Before he goes over the bridge, isn't there another check point?

A Yes. The Queens abutment. I mentioned it earlier. It is merely a check of identification. There is no registration done at that point, merely a check, because you realize there are three possible ways of getting on from there, from the parking field, by passing the Construction Control or directly from the Construction Control. So it is a matter of identification.

If it is an employee, the car has a sticker on the bumper and he flashes the identification, a shield or card.

If it is a vehicle that has been registered --

Q The car is required to stop there?

A They should stop. We hope.

Q Then you go over the bridge and you come to another place where you have to stop again, is that right?

A That is the Riker's abutment, yes.

Q You have to show your identification again?

A Not only have to show your identification, but it is a point where we divert traffic according to the type of vehicle coming over.

Q Even if, let's say, you are going to the traffic circle into the parking lots, you have to stop, still, at the --

A Well, you have to stop because of the fact that some vehicles must go into the West Parking Field, some are supposed to go into the East Parking Field or East Field No. 2, or some cases some are permitted to go through Gate 4. If it is a construction piece of equipment or a delivery item or if it is an authorized type of vehicle, it goes through Gate 1, people with the Department of Correction, in terms of prisoner transfer or myself.

Q So you stop and identify yourself again at this point?

A Yes. Well, the identification is very fast. It is a matter of showing what you have in the car in terms of the identification card or your own shield, and so forth.

Q I believe you said the first visitors for the House of Detention for Men begin arriving as early as 9:30 in the morning, is that right?

A I would say so. I mean, you know, you have got to be very general in this type of statement. It could be 9:15, it could be 9:30. Some come at 9:00, some at 9:30, some come at ten o'clock. They start coming over, roughly, at 9:30.

Q Are there any other institutions on Riker's that have visitors coming that early?

A The only one that would have them coming, which would be a very small amount, would be the ones visiting the hospital.

Again, I mentioned the word "visiting." Their hours are in the morning, the same as the House of Detention for Men, because of their own administrative reasons, feeding and so forth.

Q What is the population of the hospital?

A I couldn't give you that exactly. I would say probably about two hundred.

Q And those are the only two institutions on the Island that have afternoon visiting hours, is that correct?

A Not so. I mentioned earlier that there is a small group of inmates who are housed in the New York City Correctional Institution for Men, the sentenced institution. These are detention inmates who are undergoing the methadone detoxification program.

Q About how many of those are there?

A Again, I would say about two hundred odd. Perhaps it has risen. It will continue to rise, I might say, because we are phasing out methadone detoxification city-wide.

Q So you have got visiting hours in the afternoon for about 200 people at the hospital, about 200 people in the methadone program -- that is going up -- and about 1500 people at the House of Detention and --

A And a number of women.

Q About how many women are eligible for that kind of visiting?

A I can't give you that figure. I would say, roughly, around a hundred at a time.

Q The bulk of it is the House of Detention for Men in the afternoon?

A Yes.

THE COURT: What time do the visits start at the House of Detention, actually at the institutions?

THE WITNESS: At the institution, the House of Detention for Men, if I recall correctly, start at twelve or should be. The detox should start at one, the hospital should start at twelve.

Q And these days it's been running how late, do you say, at the institution, about 4:30?

A I think the House of Detention for Men, they have been running as late as 4:30, five o'clock. I can't account for the last few days. There have been some adjustments made within the institution which I think the

warden of the institution would be better able to answer than I can.

Q Do you know how many visiting shifts they are running?

A I would say, roughly, three to four. Again, I would say that this probably can be expanded upon and discussed with the warden of that institution.

Q Has this gone up recently, drastically?

A You mean his work load?

Q No. The number of visiting shifts.

A I couldn't answer that. I could say it is about the same. But the work load, itself, may be expanded. I don't think I can answer that correctly. I would rather the warden of that institution answer that.

THE COURT: Incidentally, one figure I haven't got. I don't know how accurate a response anybody can give but it is this: Are you in a position to tell me approximately how many people in the 1500 inmates at the House of Detention for Men, approximately how many visitors there are when there are 1500?

THE WITNESS: For that institution?

THE COURT: Yes. What experience has there been when it has been a thousand?

THE WITNESS: I would have to come close to it.

I would say probably he runs close to 6000 a month.

THE COURT: 6000 a month?

THE WITNESS: I would say at least that a month.

THE COURT: I guess somebody else will be able to tell me about that. You probably can't.

You, Warden, will be able to tell me about the number of visitors you have?

A SPECTATOR: Yes; for my institution.

THE COURT: But at your end, Warden Buono, is what I am interested in.

THE WITNESS: I can give you like a total figure. We have breakdowns available in my control system but I usually know from the top of my head an estimate.

THE COURT: Without the records here, your estimate would be about 6000 a month?

THE WITNESS: Yes.

THE COURT: When you have 1500 residents.

THE WITNESS: At least that, I would say.

Q When you said that the visiting starts at the institution at about noon, you say the people first begin to arrive there at about noon or do they first begin to have actual visitors then?

A They begin to process about noon or a little earlier.

Q By the way, is there any cut-off hour after which you won't accept a visitor for MDM?

A At the Bridge Control Building?

Q Yes.

A We can't call it a cut-off hour because we don't usually refuse anyone unless the institution does. We call the institutuion on an individual straggler but the cut-off hour would be 11:00 to 2:00 p.m., supposedly.

We would not process any more people from that bridge site and that does not present any problem because up to now, we have had -- haven't had any situation where people get there after two o'clock for an afternoon visit at that institution.

Q If anything your problem is the opposite, you have a lot of people coming earlier?

A The impact time is earlier, that's about it.

THE COURT: Is that true for all the institutions?

THE WITNESS: About all the same, your Honor.

THE COURT: Everybody has that residual hope, that if they get there earlier, they can stay longer?

THE WITNESS: That's true.

Q About what time does the actual visiting begin at MDM?

A Again, I would have to estimate. I am not trying

to hedge. So far, I haven't hedged any answer.

I would rather the warden himself give that because we are going into his visiting house and I would feel I would rather have a more accurate response from the warden.

THE COURT: Are you saying the processing or the visiting --

THE WITNESS: His processing and visiting more or less --

THE COURT: Doesn't take very long?

THE WITNESS: Not too much, no, because once they start moving in there, he is ready to put them into the booths.

Q I believe you mentioned that when people come very early or if you have problems and there are a lot of people waiting, you prefer that they wait down at the House of Detention for Men, rather than at the patrol area, is that correct?

THE COURT: Are you asking for the permanent preference?

MR. BERGER: Yes.

Q I recall that you mentioned that sometimes people get there early and have to wait a long time and you sort of -- you said that you would prefer they wait at the House

of Detention for Men.

A I would think -- I have to think in terms of my operation of a departmental and an Island problem, plus personnel and so forth. I know within my self, he can just handle so many people in his waiting room, too.

I think I made the statement that I wouldn't move people up to his place beyond the time we have agreed upon or before the time we agreed upon. I would prefer --

Q What time is that again?

A We move his people up there roughly about 11:30, roughly. It varies depending on the work load. It would be 11:00, 11:30. Usually it is around 11:30.

Again, it depends on the work load, the liaison between his personnel on the other end of the line, plus the personnel he has at the bridge site and my personnel. It has to be a flow pattern that works according to the work load that we have for that day.

Q You mentioned that you very carefully choose the officers working at the control point.

A For the bridge operation, yes.

Q Why is that?

A I thought I made it fairly clear, that I have to have people that are, certainly, emotional stable, people that can deal with the general public, people that can take a

lot of abuse, that can relate themselves to the visitors.

Q Do they take a lot of abuse?

A They certainly do.

Q What kind of abuse?

A Verbal, physical, weapons, whiskey bottles on their head, people fighting each other, taking their clothes off. I can go on for a couple of hours, if you want.

Q How long do people sometimes have to wait in the control area?

A It is hard to say. At least an hour or an hour and a half sometimes, only because of the fact that they arrive much sooner than they are told to get there.

I mentioned earlier, the visiting hours are going to begin at an institution at five. We have some of them on the Quuens side at two o'clock and two-thirty in the afternoon. Of course, they are frustrated, but they have been told.

Q Why are they frustrated?

A I don't think anybody likes to wait.

THE COURT: I will take judicial notice of why they are frustrated. It is frustrating to get hit on the head with a whiskey bottle there.

THE WITNESS: It's happened. We had a few

arrested.

I would like to elaborate on what problems we have at the bridge site.

Let's take New Year's Eve. I had a drunk come across the bridge in a car, smash through the check points, demolish the west section of the Bridge Control Building, $50,000 worth of damage, put two of my men in the hospital, and this fellow is dying, and this is a few of the things that I have to contend with at the bridge site and this was a result of a hidden whiskey bottle that he had on New Year's Even, you know.

THE COURT: Was he connected with anybody on the Island?

THE WITNESS: No. These are the weird things, your Honor, that are just weird, you know.

THE COURT: He is not chargeable against either the defendants or the plaintiffs?

THE WITNESS: No. But he has six charges on him now. He's been arrested and --

Q By the way, in terms of this -- this is just an aside, but are there any signs posted up in the building that no alcoholic beverages are permitted?

MR. TOBIAS: Objection.

THE COURT: Your testimony, I don't suppose, is

terribly important. I don't recall any such signs.

A No, we don't, but the thing is, there are so many other things that we can post that they are not supposed to have or do besides alcohol.

We could say you are not allowed to take your clothes off or strike officers or other people. It is just a question of demeanor in a public building. That's all I can say.

Now, the inmates have the rules and the regulations issued to them. Those should be transmitted to their visitors.

Q You mentioned that on Mondays, Monday evenings, there are children visiting for all of Riker's Island.

A Yes. We call it juvenile visits; yes.

Q Every institution?

A Yes.

Q How many children can an adult bring?

A One.

Q Monday is the only time that an adult can come with a child; is that correct?

A Not only an adult, but it can be an adolescent. We do have adolescents visits inmates who also have adolescent children.

Q Monday night is the only time that more than one

person can come for a visit with any individual inmate?

A Well, the one person is only a child.

THE COURT: At what age, what is the definition of a child?

THE WITNESS: Up to sixteen because they are allowed to visit by themselves over that.

THE COURT: They are?

THE WITNESS: Yes.

THE COURT: And if they are below sixteen, even if the parent thinks they are capable of coming over by themselves, they have to be accompanied by an adult?

THE WITNESS: Yes. We don't permit them to visit unless they are sixteen or over. As an individual, your Honor.

THE COURT: I understand.

Q You mentioned that C-95 is being constructed and that it is going to have an additional visiting area.

Do you know about how many inmates that visiting area will be able to accommodate?

A I think it is eighty.

Q And after that is opened, is it your testimony that ADC is going to begin having its visits over there?

A Yes. Well, let me change that in this respect. The visiting for ADC will not be in the new construction.

It will be in an area of the existing building which is being modified,or will be, to be a visiting house but it will have its own visiting house. I hope I made that clear.

Q A modification of, you said of a part of the existing building. What building?

A The ADC.

THE COURT: In other words, it won't be in C-95?

THE WITNESS: That's right. I don't want to confuse the testimony. I want to make it clear.

THE COURT: The important thing for our issue is it will relieve the HKM?

THE WITNESS: It will be in its own building.

Q This new visiting house for ADC that is being constructed in the present building, about how many inmates will that be able to hold?

A I thought I answered that. About eighty.

Q No. You said that there are two new visiting areas being constructed, one within ADC and one for C-95, is that correct?

THE COURT: No.

A I think we are confusing it.

THE COURT: What I thought you said was that ADC and C-95, the new part of 95, will deal with adolescents, part of it.

THE WITNESS: Yes. Well, Judge, if I may, the

C-95 project is a rather -- let's say it is a little confusing because the people begin to think it is just one institution. It is two institutions.

THE COURT: I understand that.

THE WITNESS: One institutuion which will be entirely new will be composed of 768 dormitory style beds. That is a separate institution by itself, which will have its own visiting for that new institution.

Q And how many inmates will that take?

A I can't recall offhand. I think offhand it is about seventy-eight or sixty. I can't be sure now. I can't recall every inch of the new construction. I know most of it. Sixty or seventy, I am not sure. That is a separate institution.

The supplementary type of service that is going to be provided for the Adolescent Detention Center will be a modification of the lobby area, the present lobby area to be a visiting area for the Adolescent Detention Center, because the question you asked me was relative to the Adolescent Detention Center and I have to tell you it is not in that building.

Q In the C-95, the 48 beds for the mental observation, where will that be?

A Part of the Adolescent Center. A fifth quadrant --

if you recall, we are building a fifth quadrant, under construction now, which will be a part of the Adolescent Detention Center.

Q At the moment, Warden, just approximately, what is the combined population of the House of Detention for Men and ADA?

A If I recall, the House of Detention for Men is running around 1500 and I think ADC right now is somewhere around 700.

Q That is about 2200 a month?

A I don't check the count of the day. I would say that, about that.

Q And they have to share how many booths?

A Eighty booths.

Q It is not --

A They don't share them. There are eighty now available in the House of Detention for Men.

THE COURT: Well, they share them in the sense that --

THE WITNESS: The block of time is different, your Honor.

Q In reality in terms of theones that are operational, isn't it a bit less than eighty?

A Again, I would rather have the warden of the

institution answer that.

Q I would like to compare that for a minute with some of your other institutions on the Island, if I may.

Abou. how many booths do you have at ARDC?

A If I recall, it has about the same amount.

THE COURT: About eighty?

THE WITNESS: About eighty.

Q What is your population there, about?

A The population now is close to 1100.

Q And how about the Women's House?

A Well, I believe that is fifty-odd booths, fifty-four, if I recall.

Q What is their population?

A I think theirs is about four hundred-odd or 450.

Q Do you recall how many booths the Tombs had?

A I don't recall now, no. I had worked in the Tombs many, many years ago. I have enough problems in Riker's Island --

THE COURT: How would you like to be me? I have them all.

Q You say it's going to be about two years until this new visiting area is ready.

A The estimated time of completion runs about two years from now, yes. I may have said earlier, again, I have

got to repeat this -- barring strikes and availability of materials.

Q Are there any other plans to construct any other additional visiting areas on the Island that you are familiar with?

A No. The only other plans I can recall would be the visiting areas for the new hospital we are going to build on Riker's Island.

Q Apart from that, you heard Mr. Tobias announce to the Court that the City is formulating a plan for contact visiting.

You expect that to be done in the same facilities you have now?

A Yes.

MR. TOBIAS: The plan that we are going to submit, as I stated earlier in my remarks, the details, the final details haven't been worked out, so --

THE COURT: That doesn't mean the witness can't answer the question or that it is not relevant.

A This is a projection. In other words, there is no question that I will have to be called in on whatever is going to be done. That is the best way I can answer that question. Everybody will be asked to give some input. That's about all I can do.

Q I believe you said that when a visitor arrives at the control area and signs in the officer at the control area calls the institution and informs them that the inmate has a visitor.

A I think I will have to answer that in terms of progressive processing. It's not exactly the way it is, what you say.

When they come through the door, they are given an identification number in terms of turn to be called --

THE COURT: In terms of what?

A In other words, they are given a card with a number on it which gives them the rotation to come up to that window.

When they are calling, they start calling these numbers up to the window of the particular institution concerned, they identify themselves, who they are to visit and that information is then transmitted over the telephone to the control room of the particular institution concerned, telling them that John or Mary Jones is here to visit John Jones.

Then they are seated, because it becomes a problem now of locating this particular inmate and if the inmate is not --

Q And they sit down again?

A They sit down. Then, within another period of time, they will be called by name now, because now they have been identified and entered into a roster sheet to be called by name.

Q They have been sitting there a while before they are initially called up to the booth, right, to give their name?

A Right.

Q Then, they go back and they sit down again; is that the way --

A Right. Now, say this group of 1 through 40 would then be processed through the turnstile, receive an identification badge with a number on it, which is now representing the fact that they have been authorized to pass through the control building.

At that point, as I say, they are registered in. That is where they sign into the sheet and get the number and then taken by bus to the institution.

Q Just to go back a few steps now:

They go through the turnstile, and get the number and doesn't something else happen at that point?

A What do you mean? Signing a sheet?

Q No. Aren't they searched at that point?

A Well, searched?

Q Isn't there an officer at that turnstile with a metal detector?

A Yes. That's not a search. That's a frisk.

Q He frisks them?

A Yes. A cursory type of inspection; a frisk is a body type of thing. He has a metal detector.

Q And he also --

A And the pocketbook routine and so forth.

Q Takes newspapers, doesn't he?

A Yes, he takes anything that we feel that could have something concealed in it.

I have to ask you something; why do you smile?

Q Do you take judge's newspapers?

THE COURT: Yes, they do.

A Why not? They check my car.

Q After the individual gets -- goes through the turnstile and is frisked, he doesn't go directly to the bus, does he?

A They may sit down, depending again on -- we are asking a time element. It may be the first batch being assembled, we may be loading them into the one, second waiting room area to put them onto a bus or we may have such a backup that we have loaded one bus and we are going to be pushing the others through, so go into another bus.

Q By the way, how many of these small buses do you have to take people around the Island?

A Well, we have different sizes.

Q Sure, I understand. How many of these buses do you have?

A The buses used for the transportation of inmate visitors are either 32 passenger or 45 passenger buses.

At that particular time, each institution has at least one bus assigned to that service plus a supplementary bus which is a type of bus that will back up a work load type of arrangement.

We have smaller buses which we call the 15 passenger metros. These are not used normally for the heavy work load type of transportation.

THE COURT: Is that for transportation of visitors?

THE WITNESS: That's right.

These buses that you mentioned are -- we have a large number of them but they are not all utilized just for the purpose of inmate visits.

Some of them are being utilized to move personnel; some of them to move inmate work details.

Q How many do you have altogether?

A On the Island?

THE COURT: Total buses, all kinds.

A Total buses, about thirty some odd.

Q Are they all working at the moment?

A Most of them are.

Q How many are not?

A I can't give you a count. Our down time runs probably around 20 percent, between deadline and preventive maintenance.

Q You couldn't spare one of those buses to take people across the bridge?

MR. TOBIAS: Objection.

THE COURT: Overruled.

Could you?

A No, we couldn't because we have all we can handle right now.

Q If they gave you another bus, you could do it?

A It would be personnel again. First of all, I don't see the reason -- I mean I can't -- I have to answer your question this way, in thinking. Now you are coming into a security area. Now you are --

THE COURT: Let's put it this way -- what would be the problems that you would have to overcome in order to run a bus across the bridge?

THE WITNESS: That's the point. We would have to

go through the same processing at the bridge control that we do now. They would have to be admitted in the bridge control building exactly the same; they would have to go through the same processing and that's the answer to that question.

Q Yes, but is that a reason for not providing a bus to take them across?

A That's a good enough reason, I think.

THE COURT: Would there be any difference? There would be no different security arrangements for the bus you ran yourselves and a bus that somebody ran?

THE WITNESS: It wouldn't provide any additional type of service that is not in effect at the present time.

THE COURT: I assume that Mr. Berger is trying to bring this out asa contribution on the part of the City to visitors to come over there as an expense proposition.

MR. BERGER: We are trying to find ways of streamlining the visiting period in general and there are people who wait considerable periods of time for the bus to arrive, for the public transportation bus to arrive because they are not allowed to go over in their cars and what I am trying to bring out is whether or not the City could provide 1 or 2 buses to take people across the bridge, people who come by their cars, just as the City presently

provides buses to take people from the control house to the institutions.

MR. TOBIAS: Your Honor, I don't think that is relevant to this inquiry. We are talking about expansion of visiting hours.

THE COURT: It's peripheral. I think it's peripheral but as long as we don't take much time on it, I will hear what the answer might be.

But, let's assume, for example, that the Ford Foundation -- although even it is having a problem now -- came along and said "we want to give the City a couple of buses to make the problem of going across the bridge and back." I can understand that that would not change your security problems at all --

THE WITNESS: That's right. It would require a custodial officer again being assigned to drive because these are radio controlled and there are security movements and it would mean we would have to provide additional services in terms of officer drivers and this type of thing.

It is something we would have to look into. I have never said "no" to any type of suggestion unless I can look at it first.

Q Suppose just a hypothetical proposition, that the City was running express buses to Riker's Island directly

from, let's say, Harlem, the lower East Side or whatever, and you therefore had a great increased number of visitors. That would present a lot of problems for you, wouldn't it?

A It would present --

MR. TOBIAS: Your Honor, objection. I think we should stay within the scope of the issues.

THE COURT: I think I can take not only judicial but ordinary notice of the fact that if you have more visitors, you would have more problems.

Q If the hours are expanded, you are going to need more men; isn't that true?

A I don't see how we can change the hours at the present time, at any time, under any circumstances and any of amount of men will not alter the fact that I brought out some statements as to administrative problems within each institution that must be coped with. I mean these are real problems that --

Q We will hear from the wardens on the problems of the various institutions.

A I am saying I have to give you the same answer, that changing the hours is not going to make any difference to us, as far as we can see it right now.

We will still have the same problems with the same restrictions in terms of moving them up through a place

by a certain time and that is the best I can answer that, I think.

Q What are your problems in moving them up to the institutions? That you don't have enough buses?

A No.

Q You don't have enough personnel?

A No.

Q Can't search them all adequately?

A No. The fact is, I think I made it clear, or I thought I made it clear, that we have a time factor to contend with. When we take them to the institutions, we have a factor of when the institution can take them into their waiting rooms and process them through their area. That institution has to take clothing, cash from these people. It isn't a question of personnel.

Q If that institution had more officers to take the --

MR. TOBIAS: Please let the witness finish the answer. He is not finished.

THE COURT: I thought he was finished.

Were you?

A (Continuing) I mean, I think I could go on for a period of time but it's not a question of additional buses, additional personnel. It is a question of what the

institution can handle when we take them to the institution.

Q Suppose the institution was able to handle the additional volume of people and packages and all of that. Could you provide the screening and transportation to get them to the institution?

THE COURT: MOre quickly?

MR. TOBIAS: Objection. This is pure conjecture

THE COURT: Come on, Mr. Tobias. The City contends, and I think it's perfectly proper for the City to contend, that you cannot expand visiting hours beyond what they are at the present time and I think that the plaintiffs are entitled to try and find out what you would need if you could or whether it is at least humanly possible.

I am perfectly prepared to agree the City of New York is not wise to spend all its resources seeing to it that visitors reach the prisons. On the other hand, I think a reasonable exploration as to what would happen if there were more people to process at the institutions is certainly appropriate.

So, the question is, as I understand it, if the institutions could do the job faster, could you do it faster?

THE WITNESS: I don't think we could do much better than we are doing right now, your Honor, under the way we have it.

Q I didn't mean could you do it faster. I meant if you had more people coming in the expanded hours, would you be able to process them all.

A More people? How many more? I am not trying to dodge the question. I think you can see that I have been here all morning -- 10, 20 more people? No problem. 200 more people; a problem.

Q What kind of problem?

A Again the fact of the area that we have to work with, the logistics we have to work with, the fact that there are certain time elements it takes to process the individuals.

No matter how -- there are so many factors that if you have been to the control building -- which you have, I now by the questions that you ask -- you know that there are problems which must be considered in our favor and these are just the ones I have mentioned.

Q Well, just a hypothetical: Suppose you had all the windows only working for MDM and you had three people checking in visitors, instead of one.

A I would have to check with the institution. I couldn't recommend that any other institution be bypassed even when we build the new one. I don't know what will happen then.

Q I am not asking for that. I am asking a hypothetical question as to what you might be able to do.

A I don't think I can answer that right now.

THE COURT: I don't think there is any point in asking questions based on hypotheses that are not related to the facts.

You can attack, representing people of the MDM, you could attack, theoretically, the City's position that it is going to treat all institutions differently and I think I would disagree with you. But if they are going to treat all of them differently, and the Court thinks it is appropriate they should, the Court has to deal with that as the hypothesis and not something else.

MR. BERGER: I understand. We are trying to bring out the overall because the plaintiffs in this case are every bit as much interested in them, I think, as the warden is.

We would like to see visiting expanded the City provide the facilities and a staffing that makes it possible to expand.

THE COURT: I understand.

Q When a visitor is at the house, the control point, and the visitor --

THE COURT: The bridge control point?

Q -- the bridge control point, and he has given the name of the inmate he intends to visit, when the institution is called to be informed that there is a visitor, exactly what is the institution told?

A Well, again I think you would have to ask the individual institution because that liaison man behind that window represents the institution, not me.

THE COURT: I think Mr. Berger is asking what do your people tell their people.

Q What is he supposed to do? Give the name of the inmate who is going to be visited?

A Basically, he has to give the name of the person visiting and the person being visited.

THE COURT: Is there anything else?

THE WITNESS: That's about all.

THE COURT: You don't have to say she is five feet two and has eyes of blue?

THE WITNESS: There is no description, usually. I want to make it clear that this individual transmitting the information is assigned to the institution where the visit is being made. He is not a headquarters man, one of my men.

THE COURT: He works at the bridge.

THE WITNESS: He works there and we do it for a

definite reason. It makes better liaison.

THE COURT: They know each other better?

THE WITNESS: Yes.

THE COURT: What you assume, as you said several times, Mary Jones is here to see John Jones and that's about it. That's about all he needs to say?

THE WITNESS: That's right.

Q You don't know, I gather, what happens at the institution in terms of procedures for going to get the inmate, find out --

A I am familiar, counsel, with it but, again, I would rather not give my testimony. I would prefer that the warden of the institution does that.

I ran institutions for many, many years but that was back in 1960 somewhere, where I had the control. I want to be fair. I would rather the institution who would have to be questioned, have the warden answer that question.

I am familiar with it, you know, I know what they are doing, but I would rather that person said it.

Q I believe you testified that there is some visiting on the Island on weekends?

A That's right.

Q What were the hours you stated for that?

A The institutions basically are the sentenced

institutions. They have visiting hours from nine to twelve, but the detention institutions also have a visiting hour, half an hour for the afternoon period, if I recall. I think it is twelve to four.

THE COURT: In other words, as far as HDM, it is the same on weekends?

THE WITNESS: They have an additional -- from what our arrangement is, your Honor, between myself and the various wardens, it is that there are inmates who would come in mid-week or toward the end of the week and would not have enough time to have a visit, say, by that Friday and the purpose was that by the time they are in the House and the visitor's information gets to the visitor, rather than wait until the following Tuesday, they are permitted a weekend visit, a Saturday or Sunday.

We have done that across the board.

THE COURT: For those people only?

THE WITNESS: That's again at the discretion of the warden. I know. I set it up at the bridge site for them.

THE COURT: There is some visiting at the HDM on Saturday or Sunday but it is more limited and not general?

THE WITNESS: That's right. Not that I know of; that's right.

Q Do you have any visiting at or after four on a Saturday or Sunday?

A Not normally, no.

Q Do you have anybody going to Court Saturday mornings?

A Yes; in some cases.

Q I gather it's not a lot.

A No. We are also very limited in personnel on Saturdays.

THE COURT: What's the story on that? What percentage of your people work on Saturday and Sunday?

THE WITNESS: About 25 percent of our people are on duty on weekends -- well, that is a rough figure, your honor.

THE COURT: When you say "our people," do you mean just the people under your supervision or the whole Island?

THE WITNESS: I would say most of the whole Island works pretty much that way.

Q And on the weekends, your administrative problems of checking in officers are reduced; is that correct?

A Well, yes, to a degree but we have a great many other activities on weekends which would require these people that are officers to do other type of work.

Q What kinds of activity?

A Well, you have recreational periods, movies, religious services and that type of thing

Q Do you know for a fact at MDM those things go on on weekends and not during the week?

A I can't answer that.

Q I gather there is no one going to Court Sunday morning.

A Not that I know of. There may be some.

Q You mentioned recreation activities --

THE COURT: You might have somebody going to Court on a Sunday morning, I suppose, if a jury was out deliberating.

THE WITNESS: Yes, that's right. It would be an unusual situation.

THE COURT: We have that here, sometimes.

Q You would agree that the traffic flow at the Island on Saturday and Sunday mornings is somewhat reduced over what it is during the week.

A I would have to.

Q The construction, I assume it is not fulltime construction shifts.

A There are construction shifts on Saturday but not so much.

Q You mentioned recreation activities. You don't know whether people go out to the yard at HDM on weekends, do you?

A I can't answer that.

Q About what time of year this spring do you expect, around what month do you expect to begin working on the new yards at HDM?

A Late March, early April, I hope, weather permitting, of course; snow, mud, availability of material. You know.

I mean, I can't be -- can't give you a figure now.

Let me correct that to one other extent: I may have one other series of priority jobs thrown at me which I would have to decide. For instance, we just closed one inssitution; we are dismantling another, and we may be forced to begin construction in that --

THE COURT: Would it help to speed it up if the Court ordered it to be done?

THE WITNESS: I would rather you didn't, your Honor.

Q How long do you expect it will take, once construction begins?

A Probably take us about three months. I think I

said that earlier.

THE COURT: What is it? Grading and blacktopping, or what?

THE WITNESS: First of all, grading, blocking out the forms, pouring concrete, setting in the sleeves for the basketball backboards, laying out some other type of courts that we feel we have the space for, such as shuffleboard or otherwise.

There is setting sleeves in for a volleyball area, rebuilding the fence areas, putting electrical devices out there in terms of the telephones, electronic devices and that type of thing, so that --

THE COURT: Any lights?

THE WITNESS: No. The alarm system between the two control points, so that we can have communication, even though we use radios in addition to that.

THE COURT: You don't have people out there after dark?

THE WITNESS: No.

Q I believe you stated, Mr. Buono, those yards run about 100 or 150 feet down --

A I am just estimating. I can't recall it exactly. I would rather not be pinned down.

Q Maybe you can do it more generally. They don't

run the full length of the blocks?

A They do not.

Q About half the length of the blocks?

A I would estimate about that. I am not sure now. I can't recall. The one for the B Section is a little different. It doesn't run actually between the blocks, per se.

Q That is the one at the front of the institution?

A That's right and that's different. It is more of a square type rather than rectangular.

Q All the others are enclosed on three sides by the institutions?

A By the buildings.

Q What is enclosing the one on the fourth side?

A The fence.

Q Do you know, with regard to the other three yards, are there any fixtures on the other side of the fence in the immediate vicinity?

A I don't know what you mean.

THE COURT: What do you mean?

Q Any buildings?

A Not immediately adjacent to it. You mean beyond the fence line?

Q Yes, if you are going out past the fence line.

A I can't recall any. We may have some service areas, vent houses or utility lines in there, something of that nature. I would have to review it myself. I know the Island pretty well but, you know, I can't give you every brick.

Q So you can't say for sure what the problems might be of extending that yard from the -- going only half-way down the blocks to all the way to the end of the blocks or even beyond?

A I don't think it would serve too much of a purpose. I would have to look into it.

Let me put it this way: When we build these type of enclosures, if you want to use that word, which it really is, I have to think of two basics.

The first is the time element that it takes to construct, rather than make one place so extensive, so that it consumes too much time, rather than getting to the next one and the amount of material that it takes, a considerable amount of concrete, and I have to work on that basis and put them in.

Extending it is something that I never looked into and I don't think I can answer that.

THE COURT: If you had the budget--putting the budget problem aside for the moment, do you know of any

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security or logistical problems that would make it not useful or objectionable to extend the area of the existing places?

THE WITNESS: We probably could extend it, your Honor, and it may require a few extra officers and that type of thing.

I would prefer, if I might interject, seeing how far we go with the additional areas, and then look back over that.

THE COURT: I agree with you. I assume that the plaintiffs are trying to suggest not only that you go ahead with the additional areas but that you extend those that exist.

THE WITNESS: I would rather, if I may again beg the Court, I would prefer to get the two areas now, the two additionals, and then look into the other.

THE COURT: If I understand it correctly, at least without any question, they have the advantage of being adjacent to where the people live.

MR. TOBIAS: At this point, I am not formally objecting to the question but I think you can speculate indefinitely on what can be done and I think that you have to tie this in with the showing of inadequacy, and I know the Court will bear this in mind.

THE COURT: Of course, it has to be shown that they are inadequate but I assume that Mr. Berger hopes that he will be able to demonstrate that and he hopes to find out what alternatives exist if he can show it is inadequate.

MR. BERGER: That's correct. We are trying to put on the record all the possible alternatives.

Q I believe you referred to a ball field on Riker's Island that was demolished to make room for D-95, is that correct?

A Yes.

Q What institution was that ball field originally built to serve?

A Originally it was built to serve the sentenced population of the now House of Detention for Men.

Q In other words, when that institution was the --

A Only institution.

Q And was the penitentiary?

A That's right.

Q It was built to house that?

A It was built for them. Then it was taken over by the New York City Correctional Institution for Men. When their population at that particular time had increased, it was used as a supplementary ball field because

they had a large sentenced population.

Q And it was preferred that a field of that nature be used by sentenced individuals?

A Well, the intention of that type of field has always been, in our minds, to be used for the sentenced population.

Q Why is that?

A Well, the sentenced population represents an entirely different custodial factor.

Q Could you explain that?

A I think it is evident that that type of inmate we had under the sentenced population are recognizable as to who they are. The fact that they have been a regulated type of assignment in the work area, they are not a detention inmate with certain unknown qualities.

The fact that they are held with us for up to, at that time, a maximum of three years, which was the indeterminant sentence and later changed to the one-year flat sentence, even the adolescent term was no longer the three-year indeterminant as of January of 1973, January 1st; that he now could only be sentenced to a maximum of one year, so now you are dealing with inmates who are serving between six months and a year.

And I think that is the best answer I can give you.

Q Right. Would you describe that ball field as an appropriate field for people who are classified maximum security?

A The large field?

Q Yes.

A Not if I am the warden they wouldn't go out there.

Q How about minimum security?

A I don't think I could answer that unless we determine what is considered to be minimum security.

Q Well, I am trying to define it in terms of the ball field as one example.

A I would have to answer that -- if I were the warden of an institution that has to turn these inmates out and I would have to make the decision as to what we classify the minimum security, it would depend on what we decide to say what is minimum security.

Q Well, in general, do you believe that detainees require tighter security than sentenced prisoners?

A It's been proven to be so.

Q And --

THE COURT: What do you mean it's been proven to be so?

THE WITNESS: Because our escapes and assaults

and unusual occurrences are so much greater in proportion with the detention inmate, your Honor.

THE COURT: On Riker's Island?

THE WITNESS: Oh, yes. I can only recall two or three, at the most, recent attempted escapes or escapes of sentenced inmates as to the much greater amount of detention inmates who have effected escapes or attempted them, including the most recent escape from Riker's Island which was from the House of Detention for Men, which included nine men of which, if I recall, seven were homicides and two were robberies with affiliated felonies.

Q Do you have any detainees on Riker's Island at the moment who are classified as less then maximum security?

A I don't follow that question.

Q Let me do it by institution.

HDM is a maximum security institution, is it not?

A It was built to be originally.

Q Isn't it still?

A Yes. I said it was built to be originally maximum security, so it still is.

Q How about ADC?

A The Adolescent Detention Center was built to be a sentenced reformatory type, serving maximum three years

and up to one year on a flat bit, so it would not be considered a maximum security institution. It has outside windows, the structure.

Q What do you mean by outside windows?

A An outside window, where the cell --

THE COURT: The cell itself has a window?

THE WITNESS: The cell itself is on the outside with a corridor down the center and the window itself, which is either borth for ventilation and for light, is directly out on an exposed area of the outer wall.

Q Yet there is a wall?

A It is part of the building. It is not a wall per se, an enclosure. It is part of the building.

Q How about C-76, the Correctional Institution for Men, is that a maximum security institution?

A No. It is not. That institution which was my area for about nine years -- I opened it in 1962 -- was built actually -- went on the drawing board in 1958 to be a work house.

THE COURT: What is a work house?

THE WITNESS: A work house had a type of inmate who is no longer in the City of New York, the indigent serving up to roughly 90 days and 6 months. Most of them were the indigent you found around the street.

THE COURT: Right.

THE WITNESS: This is what we called a work house. That institution went on to the drawing board in 1958 to replace the Ward's Island work house. However, by that time, that type of inmate in the early sixties was no longer evident and we decided at that time to use it for sentenced inmates of the three categories I mentioned.

THE COURT: Right.

THE WITNESS: And this is predominantly a dormitory institution. There are 27 dormitories in there, your Honor. All we have in the institution is 136 cells and those are open dormitories.

Q How about the Correctional Institution for Women, is that a maximum security institution?

A I wouldn't call it that. Again, it has outside windows.

Q How about the ARDC, is that maximum security?

A It is under the construction that we have. It is a little different in construction. It has a shorter type of control area. It has a heavier type of patrol. Yes, I would say it is closer to maximum than the others are.

Q Warden, would you have any objection to permitting, let's say, the officers who work at any one of

these facilities to drive directly to their respective institutions?

A Yes.

Q Why?

A Space, first of all. I don't have the space. I certainly don't need the extra problems of processing roughly a thousand vehicles on one tour through a check point.

Q Well, you said that at the moment you have got more of a peninsula than an island, isn't that correct?

A Correct.

Q So it is part of the City.

At the other institutions throughout the City, an officer can drive right up to the gate, can he not?

A He cannot. He cannot. Nowhere in the City of New York, other than Riker's Island, are there parking spaces allowed for employees. There is no agency in the City of New York that I know of that provides parking for employees.

This happens to be a convenience we put on Riker's Island for the benefit of our employees because of the fact that it was kind of remote from any other areas. As a matter of fact, there was a big budget fight back in the sixties to get the parking field.

THE COURT: Talking about being remote, I find this subject remote. What's the difference whether the guard can drive in?

You are not proposing that the visitors drive to the institutions, are you?

MR. BERGER: No. I am trying to get an idea of movement flows on the Island.

THE COURT: I think it is extremely remote from the problems I have the right to deal with.

MR. BERGER: Of course, if the officers were permitted to drive up to the institutions, there might be more space for the inmantes in at least the main part of the field, just as an example.

THE COURT: I haven't heard that is the major problem of visits.

Q Let me ask you in general, what is the total acreage of Riker's Island?

A Over 600 acres.

Q How many acres are actually built on at the moment?

A Well, it is hard to put it to you. I could take each individual area and say the women's area encompasses 55 acres, another encompasses 110, and so forth. I couldn't give it to you by a total.

THE COURT: I think if you want to introduce evidence of that kind, the proper way to do it is to submit to you a map or a plan, or whatever, of the Island at the present time.

THE WITNESS: I cannot do it. I have maps.

THE COURT: As well as one relating to the MDM.

Q You could make that available to the Court.

A We have maps of the Island which can be made available. We have relative --

THE COURT: Does it show the escape routes?

THE WITNESS: We would rather they didn't get out, if possible,you Honor.

Q I would like to read you one statement, proposition, shall we say, and I would like you to tell me whether you agree with it or not. The statement is:

"Most detainees can be safely held in custody in less than maximum security conditions."

Do you agree or disagree with that statement?

A I disagree.

MR. BERGER: Thank you. No further questions.

MR. TOBIAS: Your Honor, at this time, I respectfully submit that we would like to take the afternoon recess.

THE COURT: So would I. So you can save that.

I'll give you that favor without any charge.

MR. BERGER: Are you finished with the witness?

MR. TOBIAS: No. I will have some redirect, and this goes for any of the witnesses that I present. And this is an unusual format and I would like to reserve the right to recall any of the witnesses subject to the presentation by the plaintiffs.

THE COURT: Very well. We don't have any problem of recall at the moment because there is no one that has testified except the warden and you are going to re-examine him when you come back.

We will go to lunch and come back at two o'clock.

(Luncheon recess.)

AFTERNOON SESSION

2:00 p.m.

F R A N C I S R. B U O N O, resumed.

REDIRECT EXAMINATION

BY MR. TOBIAS:

Q Warden Buono, there has been some testimony earlier that there have been a number of facilities constructed on Riker's Island in recent years. I'd like you to further elaborate on your part in the construction of such facilities?

A Well, part of the explanation of my title is to assist the department in making certain in-put into the scope of planning of new institutions, work flow patterns, shop operations, the type of areas that are set up for recreation.

In other words, I am talking about giving the custodial aspect in terms of what we can do to place into these new institutions that are either on the drawing boards or undergoing modifications, and this has been in effect now since the -- well actually before 1961.

It was as far back as 1958, but reached a much heavier work load in the sixties, the late sixties.

Q How long have you actually be an employee of the Department working on Riker's Island?

Q Well, I got to think for a minute. I was there on Riker's Island as an officer prior to World War II. That was from 1940 through 1941 when I went into service.

Then I came back again in '46 for a short time.

THE COURT: Mr. Tobias, I find this very interesting but I don't understand what you want to bring out or why the replies on redirect. And we have a lot to do so --

MR. TOBIAS: I want to make very clear the input that Warden Buono has and his acquaintance with the varigated problems that exist on Riker's Island.

THE COURT: I understand. You don't need to spend any time on this. If Mr. Berger --

MR. TOBIAS: I think this is important testimony to have on the record, your Honor.

THE COURT: If Mr. Berger was to say that he didn't think the Warden knows as much about Riker's Island as anybody, or perhaps more, I would find otherwise.

MR. TOBIAS: I think that later on, your Honor, with this type of information on the record, it will be very easy for us to contrast the experience of certain witnesses as opposed to certain other witnesses who might be presented by the plaintiffs. For this reason, I think this testimony is relevant.

MR. BERGER: Your Honor, Mr. Tobias has already gone to great depth in Mr. Buono's background. With all his years on the Island, of course he is knowledgeable.

THE COURT: I really think you are gilding the lily. I know that he knows his stuff.

MR. TOBIAS: All right.

MR. BERGER: I agree with his positions but he has no certain facts. We concede that.

THE COURT: That's right.

MR. TOBIAS: It is more than just knowing certain facts and this is the thing I want to clear up now.

THE COURT: Mr. Tobias, I have made it quite clear that I think this man on the stand knows as much or more about Riker's Island than anybody I can think of in the City of New York, and I don't want to spend more time on that.

MR. TOBIAS: All right.

Q Warden Buono, just one other thing.

Does your office investigate incidents of security breaches on the Island?

A Yes.

Q Regardless of what institution?

A Yes, we would, because in the final analysis, the outcome of any breach of security of an escape or an

attempted escape or confrontation would become a problem that is placed into my office as to response and assistance. So we would have to know some of those facts involved. So it definitely would be a part of our area.

Q So any time there is an escape your office gets involved?

A Has to be. We have to be notified immediately if there's an idea there may be an escape.

THE COURT: You are in effect, the Police Department of the Island in a sense?

THE WITNESS: Yes, we are the security group, your Honor. We coordinate the necessary actions to be taken in terms of an unusual occurrence.

THE COURT: Right.

THE WITNESS: That is the best way I can put it.

THE COURT: That is a very good way to put it.

Q Warden, there has been some testimony regarding the status of the building now known as the New York City House of Detention for Men and I believe that on cross examination you referred to it as a maximum security institution.

Would you characterize this institution's internal programs and internal features as maximum security?

A Well, I would --

THE COURT: Will you repeat that question, please, Mr. Reporter?

(Question read.)

A We'l I would answer it that the building itself is a maximum security institution in terms of structure; but I do know that there has been a considerable amount of changes made programwise, within the institution to lessen that type of operation as we would classify maximum security; as to movement --

THE COURT: You mean allowing people to move more frequently in the building?

THE WITNESS: Yes, your Honor.

THE COURT: Of course that applies only when you are out of your cell?

THE WITNESS: Yes, yes.

THE COURT: Right. So it depends on the number of hours that you are out.

THE WITNESS: It would be the time you are out and the extent to which you are allowed to move about, the congregate feeding, the type of feeding we have, which is an individual feeding type of arrangement, whatever recreation programs, education programs there may be, and I would say that it has changed considerably since my years up on the Island.

Q So then you won't characterize the institution as purely maximum security institution?

A Well, the institutional operation.

Q Yes.

A I can never deny that the structure is still maximum security.

Q So in response to Mr. Berger's question then, when you stated that it was a maximum security institution, you were talking about the walls and the physical plant?

A Well, I also use the word structure. I hope I can make it clear. I am talking about the building itself, the structure of it.

Q Now Warden, were you acquainted with --

THE COURT: Let's put it this way.

Maximum security, if you are going to get truly profound about it, has got to be a function not only of the physical plant but as you say, the program.

THE WITNESS: Yes, sir.

THE COURT: For example, the Manhattan House of Detention is certainly maximum security, but it wasn't maximum security for the Warden?

THE WITNESS: That's right.

THE COURT: He could come and go as he choose?

THE WITNESS: That's right.

THE COURT: So it is the total of these things that constitutes the program?

Q Now, Warden, have you seen this building now known as HDM as it was used prior to its being used for the present detention population?

A Well, yes, did I see it before?

Q Yes.

A Oh, yes.

Q Did the treatment of inmates who were incarcerated at that institution, hasn't changed over the years and if so, how has it changed?

THE COURT: I don't think that's relevant, Mr. Tobias.

It's what it is now that I am faced with. Not whether it was a lot worse before or lot better before that counts.

MR. TOBIAS: Let me rephrase the question then.

Q Has there been a greater loosening up and have there been additional privileges --

MR. BERGER: Objection, your Honor, this is getting awfully leading.

THE COURT: It's not only leading but it's again I don't care, you know, if people were held in a hole in the ground a hundred years ago and they are given

different conditions today, it is what counts today that I have to judge. And I am perfectly willing to believe there have been tremendous changes in all these institutions over the years.

MR. TOBIAS: See, your Honor, I am afraid that sometimes we tend to get hung up on labels and I just want to know if it is Warden Buono's opinion that this building, though built as a maximum security structure, is now administered as a less than maximum security institution; that is really my question.

THE WITNESS: I'd say yes to that.

MR. BERGER: Objection.

THE WITNESS: Yes to that.

THE COURT: But I think in the last analysis it is not a question of opinion any more. It is a question of the facts behind the opinion that count, and as you know, I visited the place twice and Warden Thomas can remind me of all the good features of it and so on. I think to the extent you are concerned with maximum security, we probably all agree that are involved in this litigation, that at HDM it boils down pretty much to the lock-in lock-out situation. I would not say exclusively. And so I think we really ought to get to that. If you are in your cell 23 hours a day it does not make any difference how many art courses there are

available. On the other hand, if you are out of your cell 23 hours a day, that is quite a different proposition.

MR. TOBIAS: No further questions.

MR. BERGER: Let me just clarify one thing.

RECROSS EXAMINATION

BY MR. BERGER:

Q You mentioned a few characteristics of HDM that you said were not maximum security, not as great a security. Do you mean to say that because an institution has congregate feeding as opposed to feedings in cells, that by virtue of that, it becomes something less than maximum security?

A I would say so, yes, counsel.

Q You know the people ate out of their cells in the Tombs, do you not?

A I am sorry, I can't hear you.

Q You know the people ate out of their cells in the Tombs?

A I am only answering questions as far as Rikers Island is concerned.

Q All right. Withdrawn.

A As far as that is concerned we used to let inmates feed in their cells in the old Raymond Street Jail when I was warden there, you know.

Q Withdrawn.

MR. BERGER: No, further questions.

THE COURT: Thank you very much, Warden. Very nice to hear your testimony.

THE COURT: All right, Mr. Tobias, you want to call the next witness?

MR. TOBIAS: Yes. My next witness will be Warden James Thomas.

J A M E S A . T H O M A S , called as a witness by the defendants, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TOBIAS:

Q Warden, how many years have you been employed by the Department of Correction?

A 28.

Q What positions have you held?

A Started as a correction officer, promoted to captain, assistant deputy warden, deputy warden and presently warden.

Q How long have you held the title of warden?

A Since 1965.

Q What institutions have you administered in the title of warden?

A Administered the same physical facilities. There

has been different names to it. For instance, when I was appointed warden it was the adult division of the New York City Correctional Institution for Men.

THE COURT: That was for sentenced prisoners then?

THE WITNESS: Yes, sir. Yes, sir. But it is the same physical entity.

THE COURT: But the function is slightly different then?

THE WITNESS: That's correct.

Q So I take it you have been the head man, so to speak, at that same physical institution since 1964?

A '65.

Q Warden, could you please tell us right now what the present lock-out schedule is?

A The inmates are allowed to lock out between the hours of 9 and 11, 1 to 3, and after the evening meal, until 9:30, and the evening meal should end about close to 6 o'clock.

Q Now Warden Thomas, in addition to these lock-out hours that you have just enumerated, are there periods of time when inmates are locked out for feeding which are not included in the hours you just mentioned?

A Yes, sir. Yes, sir. Each meal takes approximately a half an hour, perhaps breakfast taking slightly less time

than that.

Q Warden Thomas, I think it would probably serve the interest of the Court best if we went through the day, so I am going to ask you what happens at various intervals, and we will see if this can -- we can organize it in this fashion for the Court.

Now, what time are the men awakened in the morning?

A Oh, I should say maybe about 5:15, something like that.

Q What happens then? 5:15, we are at that period. What activities go on at the institution?

A Well approximately around 6 o'clock, they are let out of their cells -- well, the first thing that happens, the inmates that are assigned, which are part and who live in the cellblock, are let out to start and set up the mess-hall for breakfast.

THE COURT: How many persons per block would that be?

THE WITNESS: I would say maybe 10, 12, something like that.

And then when the wagon has come down, and the thing is set up, breakfast begins.

During Monday through Friday, priority is given

for those scheduled for court appearances are transferred.

THE COURT: They eat first?

THE WITNESS: They eat first.

Q Does your correction personnel take any action to make sure that those who are scheduled to go to court actually get to court? If so what action do they take?

A Well, No. 1, they are supposed to feed them first and then they are supposed to take and assemble them in the dayroom to await the pickup officers, transfer them to -- now several things happen. If they are scheduled to get commissary, in other words, for the cellblock that day is scheduled to get commissary, those people going to court are taken to the commissary. They get their commissary, and oftentimes they have to come back because they may have a big bag, put it into their cell and come back out and go out of the block again.

Q Warden, when is the feeding period for the entire block over?

A I would say maybe around 7:15.

Q Then what happens?

A The inmates are locked -- those that are not going to court are locked back into their cells with the exception of those that are employed in the messhall. The tiermen are also let out.

THE COURT: Tiermen?

Q What are the tiermen before we go any further?

A The tiermen are the inmates assigned to clean up the cellblock.

Q So would you characterize the period now from after 7:15 as a period of tier sanitation?

A Yes; yes. Yes.

Q And what does this tier sanitation entail?

A It entails or should entail the passing of a broom, a mop, and a toilet brush to each occupant of the cell so that he can clean out his cell. Then when that is completed, the tiermen will sweep up the tier and mop. Now all of this is not accomplished before 8 o'clock.

Some of it should be accomplished; but before 8 o'clock, everybody is locked in for the count. Everybody remaining in the cellblock is locked in for the count.

Q So you have taken us now up to 8 o'clock. We have had the court roundup, the breakfast feeding and tier sanitation. Is that not correct?

A That's correct. I would like to add to that, there still may be some people in the dayroom that have not been transferred out to court. They would not be locked back into their cells.

THE COURT: Those are the people who are cleaning

the dayroom?

THE WITNESS: No, these are the people scheduled for court appearances; because in actuality when that count is taken, those people are not on the court. They are on what we call "out of the house count."

Q I take it, Warden, that it's in the best interest of producing these people in court to make sure that the people who have not gotten to court yet?

MR. BERGER: Objection, your Honor, he is putting words in the witness' mouth.

THE COURT: Go ahead.

MR. TOBIAS: I will rephrase the question for Mr. Berger's benefit.

THE COURT: So he cannot guess what the answer is?

Q Do you segregate the people ready to go to court from the rest of the inmates in order to expedite their going to court?

A Yes, sir.

THE COURT: That is what you call leading by the tail instead of by the nose.

Q Warden, you briefly mentioned the counting process. Could you please describe for us in greater detail what this counting process at your institution entails?

THE COURT: This is the head count, you mean?

THE WITNESS: That's correct.

THE COURT: What time does this occur, 8 o'clock?

THE WITNESS: This occurs at 8 o'clock, or about five minutes after 8.

Well, the relieving tour comes on, the tour that works from 8 to 4:30 comes on and the officers from that tour plus the officers already on duty go around together from cell to cell counting each and every inmate; and they compare their counts together and when they get together then they make up a master count slip and all the officers sign this master count slip. The master count slip is taken to the receiving room, where it is checked off against a master institution count slip; and when we have accounted for all of the inmates that's on that master count slip, we consider the count verified.

Q Now approximately how long does this process take?

A Approximately a half an hour.

Q Now Warden, what are the dangers or, rather, what problems would a miscount present to your institution?

THE COURT: You mean a miscount or a miscount that did not tally with the institution's? That could be a correct count showing that there were some people who had escaped?

THE WITNESS: That's correct, but if you are

talking about the count we are not able to verify the count, it --

Q Yes.

A It may mean that we have to go back and count again. We must come up with a verification of the count before any activities can resume.

Q Would you be able to release the officers who had worked the 12 to 8 tour?

A No, sir.

Q If there was an erroneous count?

A No, sir, no, sir.

Q Now Warden, in order to make sure to help expedite the counting process, is there a pre-count?

A Yes, sir, there is a pre-count but the pre-count in the morning tour takes place -- we have a count a 5 o'clock in the morning, and we have a count that's taken about how the officers should take them. I am talking about now the 12 midnight to 8 o'clock officers should take a count immediately that they lock in. Sometime time does not permit this count because --

THE COURT: I do not quite understand when that would be.

THE WITNESS: That would be prior to 8 o'clock, your Honor. That would be prior to 8 o'clock.

THE COURT: But you say that the 12 to 8 shift --

THE WITNESS: That's right.

THE COURT: -- should take a count immediately when they lock in?

THE WITNESS: No, when at the completion of the breakfast and all the activities of talking about and they lock the inmates in, they should take.

THE COURT: Around 8 o'clock?

THE WITNESS: That's correct. Now this count is not an official count but this is if they are good officers they are going to take this count because now they have had the inmates out, some have gone to court and what not. Rather than wait to find out that there is something wrong when their relieving officer comes in, but as I stated before, sometime time does not permit for this.

THE COURT: Right. In any event, if they do that, fine, but it does not lengthen the process of the actual official count?

THE WITNESS: No, no, sir.

Q Now Warden, taking your work in a detention center for -- is that 24 years, am I not correct?

A That's right.

THE COURT: Detention as distinct from --

MR. TOBIAS: Yes.

THE COURT: For example, during the time that you were the head of this institution when it was for sentenced inmates that was not detention, was it?

THE WITNESS: No, sir; no, sir; but I have considerable years in Raymond Street Jail which is --

THE COURT: Sure I know most of the City facilities are detention.

Q Warden, in your professional opinion, does the taking of a count necessitate the inmates being locked in their cells?

A Absolutely, in a large institution the sizes that we have it would be almost virtually impossible for us to take a count with them locked out and get an accurate count.

Q Now Warden, after the count is completed, where in terms of time does this take us?

A You are now approximately at 8:30, 8:40 a.m., thereabouts.

Q Then when are the inmates locked out of their cells for the first lockout period?

A 9 o'clock. I might add that certain things are happening inbetween there. The tiermen who have not finished, perhaps, are taken out, allowed to come out, and to complete the process of cleaning the cells; also, at this particular time --

THE COURT: The cells or the tier?

THE WITNESS: The tiers and what we call the flats area of the bottom floor of the cellblock.

Q You are talking about this interval between the end of the count and the first lockout period?

A That's correct.

Q How long does this first lockout period last?

A Until 11 o'clock.

Q At 11 o'clock I take it the inmates are now locked back in their cells, is that not correct?

A That's correct.

Q What happens at 11 o'clock?

A 11 o'clock we begin our noon meal.

Q When are the inmates then locked out for the noon meal? When did the inmates know?

A Well, half of a normal cellblock are let out approximately 11 o'clock. It might be 10 to 11, it might be 10 after 11, but around in that, they let out to go to the meal.

THE COURT: I am a little confused because they are locked out from 9 to 11.

THE WITNESS: Right.

THE COURT: Now let's talk about the half of the block that then goes to lunch. Does it go first, go back to

their cells and then come out again to go to lunch or do they just stay out?

THE WITNESS: They are supposed to be locked in. They are supposed to be locked in because you -- but I am pretty certain, and it is certainly --

THE COURT: It would only be for a few minutes, right?

THE WITNESS: That's correct. I am pretty certain that in most of the cases the side that is going to go for chow are not locked in. They go right into the messhall, and then when they are finished they are locked in and the other side is then permitted to go.

Now when they finish, they are in turn locked in; and you only have out then probably the few tiermen plus the people that clean up the messhall.

Q Now Warden, after the lunch is completed, what time does that bring us to?

A Oh, that would bring us to -- it takes a little bit more time -- I would say that would bring us to about 12:15, something like that.

Q Is there any tier sanitation after the lunch is completed?

A Well, yes, there should be a sweeping of the tier, and a sweeping of the flats should take place.

Q Now Warden, is there an officer's mess at this time?

A Yes, the officers have to be relieved to eat.

Q How is this accomplished?

A Well, at that time, between say when they finish until the 1 o'clock, there are only two officers present in the cellblock. The other two officers are eating. Now we also have --

THE COURT: There are normally four officers in a cellblock?

THE WITNESS: There are normally four officers. Two of them eat at this particular period but even starting at 11 o'clock, some of the other officers are relieved by officers from the maintenance positions, recreation positions, etc., that they have to make a relief; say a recreation officer has to make a relief in block 5, another officer has to make a relief in block 6. In other words, we take care of the officers by giving them reliefs from somewhere else and at 12:20 or something like that the other two officers go.

Q Now Warden, in your professional opinion, will you characterize the feeding periods as periods with increased tention in the institution?

A Well, as Warden Buono stated, any warden, this is a very, very, very sensitive thing.

We are feeding in all areas simultaneously, and we would have -- in my institution we have nine -- if all the cellblocks were in operation, Judge, if all the cellblocks were in, we would have nine areas. Of course, some of them are not in operation so right now we have eight areas and we have to bring the food up. The food has to be properly supervised, served, the inmates have to be controlled going in and coming out, sanitation, and what-not.

Q I see.

A Now you have -- you oft-times in any institution, here is a time when you can get trouble; trouble over the distribution of food, trouble between different -- the inmates about seating, between inmates and --

Q When are the inmates now locked back out of their cells in the afternoon?

A Approximately around 1 o'clock. As soon as the 1 to -- 1:30 to -- no -- 1 o'clock shift comes in.

Q I take it they are out now until 3 o'clock?

A That is correct.

Q Warden, when this lockout period ends, how much time does it take to get the inmates back to their cells?

A I would say 10, 15 minutes.

Q In other words, they are back in their cells at about 3:15?

A That's right.

Q Warden, what type of activity goes on at this juncture in your institution?

A At 3 o'clock?

Q Yes.

A At 3 o'clock, now, we start to take another count, and this is a very important count preparatory to changing of tours at 4 o'clock.

Now it is around 3:15 to 3:20, the officers enter the cellblock, take a head count. These are officers that came on duty at 8 o'clock in the morning and those that came on duty at 1 o'clock. They go around and they take a head count of the inmates. As soon as they -- I am sorry, I am sorry, I am wrong, I am wrong -- the two -- two officers take the count at this particular time, and the 1 to 9 -- 1 to 10 officers, they go to eat.

Q I see.

A They go to eat.

Q I take it this is a preparatory count?

A That's correct, that is a preparatory count.

Q When is this finished generally?

A Oh, this is finished maybe a quarter to four.

Q Incidentally, Warden, I don't believe we brought this up: How many inmates are we talking about here?

A Well right now, I would say that we are averaging about 280 inmates per cellblock.

THE COURT: 280 to a cellblock?

THE WITNESS: That's right, realizing, your Honor, that 1-A and 1-B is a different situation, we have much smaller census in those blocks.

Q Now Warden, at this point, do you start to take a major house count?

A Well, no, each cellblock takes a count. This is a preparatory count. At 4 o'clock the tour changes, and in comes the -- now a count is taken similar to the count I described to you at 8 o'clock. That takes place again between the officers that came in at 8 o'clock and those that came in at 1 on one side and those that are coming in at 4 o'clock on the other.

Q So you have at 4 o'clock a shift change?

A That's right, and a major count.

Q And a count?

A That's correct.

Q Is there any sanitation at this point?

A No, there is sanitation in that after each time that they have a lockout period we sweep up the area and what-not.

Q I see.

A And in regard to sanitation, you must understand that the sanitation that I have described, the sanitation goes on all day. The sanitation that I described was the cleaning of the materials and the moving of the -- and -- but we have inmates who are on and sent to pay -- who are paid to clean the cellblock and they work during the entire day.

Q I see.

At this point, Warden, do you make preparations for the evening meal?

A Yes. The -- what happens is that the 4 to 12 officers then go down to eat, and about approximately 4:30 we are ready for the evening feeding.

Q And I take it half of the block goes out to take their meal, the other half is in their cells?

A That's correct.

Q When does this process usually terminate?

A Oh, around 6 o'clock.

Q And then what happens?

A Well, whatever side is out at that time, they are not locked back in. When they come out of the messhall they stay out and then the other side is let out.

Q And I take it they are locked out for an extended period of time?

A Until 9:30.

Q I see.

A On an optional. If they choose to they may go to their cells and lock in.

Q Now I notice you mentioned optional lockout. When do you have this optional lockout?

A We have optional lockout every evening after the evening meal; and we have it during the 8 to 4 tour on Saturdays, Sundays, and holidays. We do not have it Monday through Friday on the days that the courts are operating.

Q Would you explain why you do not have this optional lockout during these business hours?

A Well, No. 1, we have the courts operating, and we have a -- I didn't explain before, there is a great number of activities that are going on. We have our legal library going on. We have our movie schedule, our gymnasium schedule; that may be going on. We have the barber shop, we have the institution clinic.

THE COURT: These are during normal business days and hours?

THE WITNESS: That's correct.

Now with the exception of the clinic, these activities are not going on on Saturdays, Sundays, and holidays.

Q What problems do you foresee if you extended optional lockout to these hours?

A I see great problems. If you have an optional -- if you have optional lockout you need -- certainly need to get a man -- we get what we call, Judge, added starters to go to court. This is somebody that the Court decides they want to order forthwith.

Now we have got the trouble not only of calling his name and getting him out from the immediate environs where he may be but we have to maybe go up to the top tier in the back of the cellblock to get him. This is not a -- I am not trying to say that this is something that is very prevelant, but in addition to that, just take the visit. If we had optional lockin and the guys locked in the cell, it is going to take even longer to get the man out for his visit, because one must go up on the tier, unlock the cell, and let him out of the cell. We have no way of knowing ahead of time just who is going to get visits.

Q Now Warden, if you were dealing with a group of inmates who you knew had been classified as inmates who did not present security problems, would you be able to change the lockout schedule you described?

A No, it has nothing to do with the classification of the inmate. What it has to do with is the fact that we

have quite a number of programs, with the sizes of the amount of population in the cellblocks, it is just a logistical problem.

Q Do you feel the institution itself being a lateral institution, has any affect on this?

A Well, of course, you have to -- if we are going to talk about -- and I am quite sure we are going to get into it, and maybe I am going too far but I am sure we are going to get into it -- if you are talking about you got to compare apples with apples and not oranges with oranges.

In any lateral institution as large as the one that I have, it is a problem to get the inmates from their housing areas to the services. Let's take for instance the Tombs. In the Tombs in order to go to, say, the clinic or something like that, it is only necessary to step right off the floor, get in the elevator, and go downstairs.

In order to go to the clinic in my place, you have to go, perhaps, a city block or over, and this does make a difference.

THE COURT: It does make a difference, I am sure, although I cannot help remark, for whatever it proves, that the problems that were brought to my attention were the great problems of the vertical building, and now I am being faced with the great problems of a horizontal building. I

suppose the only solution is a teepee.

Q Now Warden, could you please describe the visitation schedule in existence at your institution?

THE COURT: We have been through quite a bit of it.

MR. TOBIAS: I don't think --

THE COURT: Do you have it in graphic form? If we can just look at something --

THE WITNESS: We have it here.

THE COURT: All right, if you want to get it in the record, but why don't you make this an exhibit.

MR. TOBIAS: All right.

THE COURT: Does that fairly state the visiting hours?

MR. TOBIAS: I believe it does. I think I have seen this.

THE COURT: I want the witness to say this first.

MR. TOBIAS: No, I would rather have the witness' testimony on this.

THE COURT: You can have both, but I want to have something to look at when I get to chambers.

MR. TOBIAS: I am prepared to introduce this as --

THE COURT: Warden, what have you got in your hands?

THE WITNESS: Institutional Order No. 65,

Amendment to Institutional Order No. 3 entitled, "Visit Procedure," and this was an extension of the visiting hours.

THE COURT: Is that your present schedule?

THE WITNESS: This is my present visit schedule.

THE COURT: All right, will you please introduce it as Defendant's Exhibit A in this hearing?

MR. BERGER: No objection.

THE COURT: All right. Received.

xx (Defendant's Exhibit A received in evidence.)

Q Warden, could you please tell the Court what days of the week the detainees in your institution are allowed to receive personal visitors?

MR. BERGER: Objection, your Honor, this is the way we are going to lose time here. It is in evidence on a piece of paper.

THE COURT: I do not understand why does he have to tell me what this says?

MR. TOBIAS: Just to keep everything organized, your Honor.

MR. BERGER: Making it more disorganized. We are losing time.

THE COURT: Either way. This seems to be a waste of time. Even if this case is appealed there will be a copy of this for anybody to look at. I will allow you at

the recess if you wish to read this material into the record but I do not think there is any point in wasting the Warden's time on that.

Warden, I would like to ask you this. I see this has a date of December 11, 1974. Is that when it went in -- it says effective December 17, 1974. Is that when it went into effect?

THE WITNESS: That's correct. Now May I explain to you, your Honor --

THE COURT: Yes.

THE WITNESS: On Tuesday, Wednesday, Thursday and Friday we had an alphabetical thing similar to what you see here, "A" to "L" on Tuesdays and Thursdays, and "M" to "Z" on Wednesdays and Fridays.

THE COURT: You mean before this?

THE WITNESS: Before this.

THE COURT: Before this exhibit went into affect?

THE WITNESS: We eliminated that. Anyone can visit on Tuesday, Wednesday, Thursday and Friday.

THE COURT: Thereby doubling the number of visits in that period?

THE WITNESS: That's correct.

THE COURT: That is the major difference?

THE WITNESS: That is the major difference.

THE COURT: From the previous schedule?

THE WITNESS: That's right.

THE COURT: So now how many visits per week is an inmate of your institution able to receive?

THE WITNESS: An inmate that has no children, he can get four and a half visits per week.

THE COURT: What is the half?

THE WITNESS: The half visit is on alternate Sundays he may get a visit.

THE COURT: I see, and that is dependent on the first letter of his last name; is that correct?

THE WITNESS: That's correct.

THE COURT: Which Sunday it will be?

THE WITNESS: That's correct. And of course if he has a child he can get one extra visit per week.

THE COURT: All right, thank you.

BY MR. TOBIAS:

Q I take it, Warden, depending on whether or not he has a child and depending on the letter in his name, he can get anywhere from four to six visits per week?

A That's correct.

Q Warden, how long are the visits?

A It comes out to four to five and a half.

THE COURT: Well, what I suppose Mr. Tobias means

in one week he might have six?

THE WITNESS: In one week it is possible he can get six visits. The next week, however, he would only get five.

Q Warden, how long are the visits?

A One-half hour.

Q Warden, I take it you were present during the testimony given by Supervising Warden Buono, were you not?

A Most of it, yes, sir.

Q You share a visiting facility with another ins;titution, I take it?

A That's right. The Adolescent Detention Center.

Q I would like to know, Warden Thomas, in recent weeks, with all the problems that Warden Buono pointed out in his testimony, how long have your visits been running at the institution?

A Prior to this week?

THE COURT: This is just for the HDM visitors?

MR. TOBIAS: Yes.

A Prior to this week they were running past 4 p.m. Like Monday we had a miscount and I think they got off almost 7 o'clock we finished. But I am happy to report that this week we have finished every day at 4 o'clock; and I am hoping that barring miscounts, we can keep up that record.

Q Now Warden, in your experience when an inmate is informed that he has a visitor, is there any problem -- are there any problems in terms of getting him to the visiting area? And in your answer I would like you to include any problems created by your having a lateral institution.

MR. BERGER: Objection, your Honor.

THE COURT: That is a good suggestion.

MR. BERGER: He is really putting words into the witness' mouth at this point.

MR. TOBIAS. I would like to know what the effect of the lateral institution is.

THE COURT: I would like to know what the Warden believes are the problems created by a lateral institution in regard to visiting. I am sure that if you have to walk a city block, it takes you longer than if you have to walk ten yards. It is not quite as simple to contrast your institution with the Tombs as was indicated at least as far as visiting is concerned because they had elevator problems there and this building suffers from precisely that problem and it can be a terrible problem too but I will hear your problems.

MR. BERGER: Your Honor, the point of my objection is only that I would like to hear the procedures at the institution from Warden Thomas' mouth without characterizations

from Mr. Tobias.

MR. TOBIAS: Your Honor, I do not think my question was improper.

THE COURT: Come on, gentlemen, I am too sophisticated to fall for the tricks of either of you. So just let me hear what the warden has to say.

THE WITNESS: Well, we are talking now about internal problems, we are not talking about the problems that we certainly have by being on an island, and having to go through the bridge control.

THE COURT: No, we are just talking about when you are told that Mrs. Jones is there to see Mr. Jones, what do you have to do to get him, and what special problems does a place like yours have.

THE WITNESS: All right. There are slips that are sent or taken to each cellblock, and on this slip the inmates that are assigned to that cellblock are listed.

Now, we may have ten inmates coming out of a given cellblock. We may pick up eight from that cellblock only to find that two, one may be in the barber shop, he may be in the gymnasium, he may be in the clinic, he may be working in the kitchen, he may be going to school, and wherever he is, we have to now go and get him and pick him up and take him to the visit house.

THE COURT: How do you find out where he is from the cellblock?

THE WITNESS: I am sorry.

THE COURT: You find out where he is from the cellblock?

THE WITNESS: That's correct. All right, now, we may find when we get to the area where he is working or where he is getting a service, we find out that he wants to go to the cellblock and get his clothes, that he wants to give to his visitor. He then has to be brought back to the cellblock to do this.

I would like to add something. The fact that we have to share the visiting house with the other institution, and the fact that we have the visits in the daytime creates problems. If we had visits at night where the programs are lessened, and you don't have any activity except the clinic, it is much easier to get them out, but this fact that they are scattered around is a very delaying factor.

In addition to that, as was mentioned today but I don't think it is very prevelant, sometime you get an inmate -- I am not saying he refuses to go but he does not have any particular interest in his visitor. You take the inmates down the -- you call out for them over the loud speaker system. Maybe the man does not respond right away.

If it is his mother or his girlfriend or something that he wants to see and he is anticipating he is going to be right up there near the front of the thing. If not he may take some time to get up there.

We may be going down the hall and he straggles or he passes some cellblock and he yells in to another inmate or he passes inmates in the hall.

What I am saying to you, there are any number of factors that delay it. It is not that you just get the slip, walk to the cellblock, get the inmates, and shoot them out. It is not that way.

Q Now Warden Thomas, Mr. Buono went into some detail regarding the security procedures and all the things that take place in the control bridge area. I would like you to tell the Court what happens once the visitor arrives at your institution, what things and what activities are carried on then.

A When the visitor comes in, there are, No. 1, if he or she wants to leave money for the inmates, the cashier's office is right adjacent, and they are queuing up to deposit money to the inmates' account. In addition to that, if they have clothing to leave for the inmate they have to go through the process of having that searched; and then they have to wait.

Now the wait is almost -- the waiting time is almost invariably on the other end, getting them from the cellblocks. There is wait on the front end, but there is a greater amount of wait on the ot-her end. It may be some time.

THE COURT: The only wait to get to your place, aside from this question of putting money in, deposit, or having a box that you bring of clothes or whatever it is searched, the only other wait that you have as to time is to go and get the man although, as you pointed out, that can take awhile.

THE WITNESS: That is right. But there are other factors. There are factors of bus breakdowns --

THE COURT: Are you talking about for a bus that takes a visitor to your institution?

THE WITNESS: That's correct.

THE COURT: I think all Mr. Tobias is saying, once the visitor gets to your place, what delay is there?

Q Warden, how long can this process take, this checking and searching process?

THE COURT: Just at the MDM?

MR. TOBIAS: Yes.

A I would say that at least 45 minutes. At least 45 minutes. You must remember that we --

THE COURT: Suppose somebody comes without any money or any clothing for the inmate.

THE WITNESS: Well, it does not make any difference because we have to pick up an entire group and start them off at the same time. We may get a guy in 1-B, he may be already in there because it is adjacent to the visiting house but now we have to get the guys from block 8 or from the kitchen or whatever it may be.

THE COURT: You mean you get your inmates as a group?

THE WITNESS: That's right. Now, there is another factor. When in processing we don't get ahead until maybe the last visits. In other words, the lists are coming up and we must wait until those lists. For instance, on the first visit we cannot begin until we have listed, and I think they take about 30, 35 in the first visit. We have to complete and list the 35, get them on the separate cellblock lists, and then they must be brought up and taken to the cellblocks. Then there has to be a period of time while the cellblock officers assemble them and then the pickup process has to take place.

THE COURT: Let me see if I get this straight. You mean you do not bring anybody -- you do not bother to go to the cellblocks until you know that everybody who has got

a visitor from the cellblock is in?

THE WITNESS: On that particular visit, on that particular visit. Now this, we are speaking about something that takes place at the bridge site.

THE COURT: Yes.

THE WITNESS: The people are registered and they are put on an individual list for each cellblock. What I am saying is --

THE COURT: How do you know when you have got the names for everybody that is going to visit somebody in that cellblock that day?

THE WITNESS: The registration officer, I am saying to you, he has a cutoff at 30 or 35. Do you follow me? As soon as he gets that 30 or 35, he stops. Right? Then these lists must be brought up, taken down to the cellblocks, distributed. The officers must then announce the names over the loud speaker system and assemble them. Then we have officers that now begin to pick them up and now is when we first discover that maybe the guy is not there.

THE COURT: All right, I understand that.

THE WITNESS: I might add something. Just to give you an idea of some of the logistical problems that's involved, down at the registration building there, are two huge files that contain 1500 cards, a visit card for each

person there. You cannot have 15 people working there. Only one at least, two men can work. One with half of the alphabet and the other with the other half of the alphabet, so additional personnel or something cannot get around this particular fact.

Then you have a problem of the people the way they come. We try to honor them in the sequence. You can have a great argument if you take and tell this person to wait over there on the side because you cannot produce that card right away. You got to go and search until you get that card and take care of that visitor before you can go on to the next visitor.

Q Now Warden Thomas, you have described some of the things that go on, some of the things that have to be searched. If people are allowed to bring in magazines and books, I take it you would want to search those items as well?

A Absolutely. Absolutely. Positively.

Q So I take it this could add additional time?

A That's correct.

THE COURT: What if they are received in the mail?

MR. TOBIAS: If they are mailed to the inmate?

A We allow them. They can mail them books.

THE COURT: They cam mail in books?

THE WITNESS: New books.

THE COURT: New books I know. What about magazines?

THE WITNESS: The same thing. They can subscribe to the magazines.

THE COURT: They can?

THE WITNESS: We have a censorship board, that in the magazine or the book we think well then we would take and let them pass on it. But we hear lately we are letting in almost everything.

Q Warden, I would like to know at the present time how many recreation yards do you have?

A I have five.

Q Warden Thomas, do you think there are no problems from a security standpoint in having yards operating simultaneously?

A Well, the more yards that you have operating simultaneously, in case of trouble you have got the added factor of getting these people in from the yard into the cellblock, and then locked in; so proportionately the more that you have, why, the more vulnerable you are.

Q Now Warden, could you please tell the Court how many times per week during the periods that the yards are in operation, the inmates at your institution can make use of these yards?

A Four days if the weather is clement.

THE COURT: For what period each?

THE WITNESS: About an hour and 15 minutes.

Q Warden Thomas, what facilities do you have in the yards?

A In each yard, with maybe -- there may be a difference and the recreation officer probably can testify more expertly, but I am giving it to you as I remember it, in the four cellblocks for the regular housing areas, one between 2 and 4, one between 6 and 8, one between 3 and 5, and one for 7 block, in those yards we have two undersized basketball courts.

THE COURT: Each?

THE WITNESS: Each. Which provides four baskets. They usually play four men to -- four men a side, meaning eight men for a basket which means that approximately 32 people can play at the same time.

Q Are there volley ball courts?

A There is one -- I think one -- I am sure they got one volley ball court. I am not certain.

THE COURT: You mean one volley ball court in each of these yards?

THE WITNESS: In each of the yards. In each of the yards, yes.

Q Warden Thomas, during the summertime or during the warm weather most when the yards are in use, in cases of inclement weather, do you make some efforts to see that some of the blocks at least go up to the gymnasium?

A Yes, yes. Yes, yes.

Q Warden, during the wintertime, what is the recreation program?

A The recreation program is once per week in the gymnasium. They see one movie per week.

Q Warden, I take it --

THE COURT: How long does the gym period last?

THE WITNESS: It is about -- it is about an hour.

Q Warden Thomas, you have seen the lockout corridors in the Tombs, I take it?

A Yes, yes.

Q How would you characterize or how would you compare the lockout corridors in your institution in terms of their sizes in relation to the Tombs?

A I really don't know, but we have an area on each side of the cellblock that's 308 feet by 11-1/2 feet. Taking off a few feet at the very beginning where the --

THE COURT: 308 feet by what?

THE WITNESS: By 11-1/2 feet and the 11-1/2 is on each side, your Honor. Taking off maybe 15 feet or 15

or 20 feet at the very beginning of the block, from the security gates that retains the inmates within the tiers, they have full scope of this area, plus they have a dayroom with the dimensions of 57 feet by 34 feet.

Q Now Warden, would you say that during lockout periods, much of this space remains unused? How would you characterize this in terms of whether or not it is being utilized? Are there empty or are there open spaces on these tiers?

A It is not -- with approximately 140 inmates, it is not terribly crowded. Oft-times in the back of the cellblock it is sparsely occupied. The inmates play handball back there and in the dayroom on the one side of the cellblock, where we don't feed, they play handball inside of there and they take physical exercise, they do pushups.

Of course we forbid them to practice judo and wrestling and boxing but they do it anyway, so --

Q Warden, I take it your officers don't interfere with the men if they are engaging in mere calistenics?

MR. BERGER: Objection, your Honor.

A No.

MR. TOBIAS: I will rephrase the question.

Q Is your personnel instructed to stop inmates from engaging in calistenics?

A No. They are not instructed to stop them in calistenics.

Q I see. Is there any new gym construction underway on Rikers Island that would in any way alleviate or remove the need for your institution to share the gymnasium?

A Well, as Warden Buono stated, there is a new institution, and I am not an expert and I am not going to get into --

THE COURT: I take it you do not know any more about it than he does?

THE WITNESS: That's correct. There will be in about two years, as he explained, additional gymnasium facilities for the New York City Adolescent Detention Center. When that is completed, it will give me full use of the gymnasium. Right now I only have the use of the gymnasium after 2:30 p.m. in the afternoon.

Q Warden Thomas --

A In addition, we are seejubg ti renovate one of the congregate messhalls into a gymnasium.

I was very optimistic about it, but there are certain budget limitations at this particular time, and we may or may not get it.

THE COURT: Wouldn't that be a fairly small gym?

THE WITNESS: No, it wouldn't be so small, your

Honor.

THE COURT: Where is it, part of your building?

THE WITNESS: Yes, it is part of my building.

THE COURT: Can you give me some idea of where it is?

THE WITNESS: I think you saw it. It was just opposite the -- the auditorium area where you got in the area where the cups --

THE COURT: I saw the auditorium the first visit out there?

THE WITNESS: That's right.

THE COURT: And I saw the commissary and it is used now for a congregate feeding?

THE WITNESS: No, it is used now, right now the area that I want is actually used as a storage area right now.

Q Warden Thomas, Mr. Berger in his cross examination of Warden Buono suggested the idea that he threw out the possibility of building extensions to the yard recreation areas that you presently use. Now, I would like to know your feelings on the feasibility of this suggestion that was thrown out by Mr. Berger.

A I am against it for the one reason, the yards which, incidentally, comeprise all the space between two

cellblocks except that occupied by the dayrooms --

THE COURT: Yes, I think I understand that, but I think Mr. Berger's suggestion was to extend them laterally or horizontally or whatever you want to say.

THE WITNESS: That's right. The minimum that you extend these things further, it means added custodial coverage, the larger it is, the more power. The way that we have it there with the cellblock on two sides, we are really the most vulnerable part is this section that Mr. Berger would like to extend in regard to escapes and such.

THE COURT: You mean the farther you get towards the open end the more you get into the problem of security. I understand that but you still, of course, have to be surrounded on three sides but you bring the farthest end out towards the open end?

THE WITNESS: That's correct.

THE COURT: Let me ask you this. If you did have the extra custodial help do you see any other problems?

THE WITNESS: Well, I don't know. I am hoping that some day that the census will go down and if the census would go down any I think you would find that we have adequate things out there. The point of it is that we do have room for some other things that if we could get them in the present area --

THE COURT: Yes. Well, if the census went down let's say like it did at the Tombs before they closed it, that would be something else, but I do not know of any statistics that indicate that is likely in the near future. Do you?

THE WITNESS: Well, I don't know. I could say something at this point but I don't want to say it.

THE COURT: Well, I mean, anything can happen, but the trend as I see it is first of all that crime -- criminal activity does not seem to be lessening seriously, although it is lessening some in some categories.

Perhaps there will be less people in detention facilities as bail decisions by courts become even less stringent than they have been, although they have improved in that regard I think. I am talking about the State Courts although I think that is true here too, ane the only other possibility that I can think of is building new facilities, which in the City's present economic situation does not seem to me to be likely to occur rapidly.

THE WITNESS: Well, what I am getting at, the addition of these new facilities that Warden Buono was talking about --

THE COURT: C-95?

THE WITNESS: C-95, should lower my census to a

single-cellblock occupancy.

THE COURT: Oh yes, I certainly hope that is true.

THE WITNESS: Well then, the single-cellblock occupancy.

THE COURT: How many would you have single-cell-block occupancy?

THE WITNESS: Well, assuming that you always have some cells out of operation you are talking about maybe 220 to 225 per cellblock and if you are talking about --

THE COURT: You have what, five blocks?

THE WITNESS: Sir?

THE COURT: How many blocks, five?

THE WITNESS: No, that would be seven cellblocks. You remember that we have one cellblock out of line now.

THE COURT: Then your total population would not be anything less than it is at the moment even though you have single-cellblock occupancy?

THE WITNESS: But I would have more room. Yes, it would. 220, seven times that, about 1500.

THE COURT: About 1500. You would have better cell arrangements. Would you have better yard facilities or equally good yard facilities?

THE WITNESS: No, I am saying that if we had about 220 inmates to a cellblock, and we only take half of them

out, and all of them do not go out, that the present facilities that we have in the yard are adequate.

MR. TOBIAS: No further questions.

THE COURT: I would like to take a short recess at this time.

(Recess)

CROSS EXAMINATION

BY MR. BERGER:

Q Good afternoon, Warden.

A Good afternoon, Mr. Berger.

Q We are getting to be old friends by now, aren't we?

A I don't know about that. Acquaintances at least.

Q Warden, you have been with the Department how many years now?

A 28.

Q And how many different institutions have you worked in?

A Well, I worked in three different facilities, Mr. Berger. I worked in the Tombs for approximately about, I think, around three-quarters of a year or half a year or something like that. I worked in Raymond Street for about -- I don't know -- nine years, and the rest of the time I worked in Rikers Island in the same institution under various names.

Q When was it that you worked in the Tombs?

A That was in 1947.

Q It was for about how long did you say?

A Six to nine months.

THE COURT: Six to nine months.

Q Thank you.

THE COURT: Raymond Street isn't operated any more, is it?

THE WITNESS: No, sir, it is torn down now.

Q How often were you in the Tombs during the past year?

A Once or twice I have gone in there to eat or something like that because I was down in Central Office. I haven't -- you mean up on the floors in the Tombs?

Q On the floors.

A No.

Q Do you know the lockout schedules that went on at the Tombs over the last few years?

A No, sir.

Q Do you know whether they were different from the lockout schedules that you have?

A No, sir.

Q Do you know whether the problems of the Tombs of getting people out to court were any different than your

problems were? Getting out of the institution, that transportation?

A What?

Q Do you know whether the problems of getting inmates ready for court were any different at the Tombs than in your institution?

A Well, obviously it was much easier.

MR. TOBIAS: Objection, your Honor, I believe Mr. Berger has very much indicated Warden Thomas is not an expert with respect to the Tombs. He worked there in 1947. I think he has already impeached him on this subject.

THE COURT: I agree with Mr. Tobias as to this extent.

Mr. Berger, I do not think it is a question of what Warden Thomas knew about what went on in the Tombs. We have a record as to what went on in the Tombs. We now have Warden Thomas' testimony about what exists at his own facility; plus his own opinions drawn from what goes on in his facility and there is nothing that prevents you from bringing to my attention any facts you want as to either institution. But I do not think that my decision depends on what he knows about the Tombs or did know.

MR. BERGER: Very well.

Q You mentioned that detainees get woken up in the

Tombs about 5:15 in the morning.

THE COURT: In the Tombs?

Q Excuse me, HDM. About 5:15 in the morning.

A That's correct.

Q Do you know whether that is later or earlier than any place else in the City detention system?

MR. TOBIAS: Objection, your Honor.

A No, I do not.

MR. TOBIAS: Objection. I don't see where that is relevant.

A I might add, Mr. Berger, I do not visit the other institutions. I am too busy. I have got all I can do to take care of my own place.

Q I am sorry, I will withdraw the question. The fact is, it is your testimony, is it not, that after they eat their breakfast they lock back in roughly from about 6 a.m. to 9 a.m.?

A 6 a.m. to 9 a.m.?

THE COURT: After breakfast.

A After breakfast now, they are just starting breakfast around 6 a.m.

Q I see. They are locked in until around 6 a.m.?

A That's correct.

Q And they get out and eat breakfast and go back

into their cells?

A That's right.

Q So maybe they are back in from around 6:30 or 7 until 9?

A Well, some of them might be. Half of them might be from about 6:30 but the second half would be 7:15.

THE COURT: But the total amount of time you are in the cell is the same no matter which half you are in because you stay in your cell while the other fellow goes to breakfast, and when he comes back you go?

THE WITNESS: That's correct.

Q Let me ask you a question -- this would apply to all three meals of the day.

The meals are served in the dayroom on the "B" side; is that right?

A Correct.

Q Now, is there any particular order as to whether the "A" side or the "B" side eats first?

A I am going to be very frank with you. I think that there was something about varying the sides. I am not too certain about it but it seems to me that there was something sometime ago but it was settled at the Deputy Warden's level as to which side and that they may alternate. I really don't know.

Q For example, I think you mentioned that for lunch that comes right at the end of a lockout period. Is that correct?

A That's correct.

Q Now, suppose the "A" side is going to eat first. When they come over to the "B" side to go into the dayroom to eat you lock in the inmates on the "B" side, don't you?

A That's what should happen, yes, sir.

Q All right. On the other hand, if the inmates on the "B" side go to eat first there wouldn't be any particular need to lock in the inmates on the "A" side, would there?

A Well, that depends. First of all, not particularly, no.

THE COURT: Could you explain why you give that answer? I mean, I do not understand why it would be more necessary to lock in men on one side than the other.

THE WITNESS: No, I said if they were already out, what I was thinking about was the time that they take the count, you see; the time that they take the count. If they took the count at that particular time, they would have to lock them in; but if they don't have to take the count and they are ready, there is no reason if they are feeding say the "B' side first which, where the messhall is, that they can't march right in and eat. Do you follow me? And I am

not at all certain that that isn't what happens.

Q What I am getting at is that the "B" side is required to lock in when the "A" side comes over to eat in the "B" side dayroom.

A Well, there is an obvious reason.

Q What is that reason?

A Well, just a minute. The other side, on the contrary, if the "B" side is eating, the "A" side is locked in.

Now, we have four officers on the cellblock. One is assigned up at the front. One guy has to be in the front inside the dayroom for the distribution of food. The other fellow is controlling the inmates going into the messhall; and the fourth officer is over on the other side where -- or whatever side the inmates are locked in.

Now, as I said before, oft-times, not oft-times but it is more likely that you are going to have disturbances. Maybe they may be minor in nature or they could really be dillies, out of that messhall.

Now, if we had everybody out, with the fact that we do not have any substantial control grillwork like you do in the Tombs, immediately the whole other side comes over; at least this way, we are only dealing with one half of the cellblock.

Q So it would be fair to say that this aspect of the lock-in policy is based on security considerations?

A That's correct, control.

Q Thank you, Warden.

How about in the evening when the men lock in at 9:30. Did you say 9 or 9:30 by the way?

A 9:30.

Q 9:30. What happens after that in the institution?

A Well, at 10 o'clock, the tour goes home and there are only two officers left in the cellblock. Inmates stay in until they are let out again at 6 o'clock in the morning.

THE COURT: Is there any lights out?

THE WITNESS: The lights stay on until 12 midnight.

Q I gather you may recall I asked Warden Buono and I would just like to confirm with you that you do have a great deal less detainee movement on the weekend; is that correct?

A That's correct, sir.

Q You don't have people going -- nearly the numbers going out to court in the morning and those kinds of problems?

A No, we -- some times on a Saturday or something we get something very special, but it is absolutely minimal.

Q By the way, how many counts do you conduct per day in this institution?

A 12 midnight, 5 o'clock in the morning, 8 o'clock, 12 o'clock or after the noon meal, 3 o'clock, 4 o'clock, 10 o'clock.

THE COURT: How many does that come to?

THE WITNESS: I don't know. I lost track.

THE COURT: Did anybody keep track? Half a dozen? Seven.

Q About how much time does it take to do each count?

A Takes approximately a half an hour.

THE COURT: Don't the pre-counts vary from the formal counts? I got the impression that some of the counts --

THE WITNESS: With the exception of the 3 p.m. count, these are all formal counts, and when I say it takes a half an hour, I don't necessarily mean it takes a half an hour to count the inmates. It takes a half an hour to compile the counts, have them taken down to the receiving room, and have the master count approved.

Q But the inmates stay in until the count is over; is that right?

A That's correct.

Q And, in fact, if there is a mistake, as some of us know how you waited in counsel room during counts, you

start all over again; is that right?

A That's correct.

Q So at least three and a half hours a day are spent in the process of counting the population; is that right?

A Well, you mean as far as the officers are concerned?

Q Yes.

A Yes.

Q Warden, I was not quite sure about an answer you gave on the question of recreation. You said that you would not favor extending the yards out any farther. Was that because you need more officers for surveillance or because you think that it would be less secure in terms of physical plan or both?

A I think it would be a less secure physical plan, and my own feeling, my personal feeling about the thing is simply this, that the expenditure and the amount of extra officers which you would have to have for this particular period and of which you would not necessarily need them afterwards, I would be -- and as one of the rules that I have is that I am supposed to administer the institution as economically as I possibly can, and my own opinion, if we would -- our census was a proper census and what-not, I think there is sufficient room in there, in the yard for

those that really want the activity. You must realize that all of the inmates, the adult population, don't want all this activity, even on the brightest of days. When they have the opportunity, the option of walking in and out of the yard, a great number of them don't go out.

THE COURT: Wouldn't there be a significant number of certain parts of the island or certain aspects of being on the island are nice, I mean it is nice, fresh air out there in the spring and I guess certainly compared to downtown New York and so on. I should think there would be a number of men who do not necessarily want to play games or be active but would just like to go out and sit outside?

THE WITNESS: Yes.

THE COURT: Is it possible for them to do that in these yards?

THE WITNESS: It is possible for them to do it in the yards. We have some benches and what-not but we don't have a great number, but the point that I am getting at, the amazing thing is that some of them with the wonderful weather out -- I am speaking about in the spring and what-not -- you can go in the cellblock and find some of them don't go out and take advantage of it.

THE COURT: Of course when you have 1500 men, you are always going to have some people of different --

THE WITNESS: That's right, but the way the yard operates, that while the yard is operating for that side, the inmates can go out, and since they can come back in when they want to, some may go out and stay half of the period, a quarter of the period or whatever it may be.

Q Warden, do you have off the top of your head the approximate square footage of the yards?

A No, I do not, except this; the length of the celiblock is 308 feet. The length of the dayroom is 57. If you take 57 from 308, that gives you the space of the yard.

Q That is the length?

A That's the length of the yard. Around the side --

THE COURT: The yard does not go all the way out, does not go the full length of the cellblock, does it?

THE WITNESS: Yes, it does -- the fence, the fence is at the end of the cellblock.

THE COURT: What is it that goes beyond that? My impression was that the recreation area ran only part of the way of the building anyway.

THE WITNESS: Well, first of all, in the front of the cellblock is starting from the very wall where you come in from the corridor there is a storage area. Then there is a shower room, and then there is the dayroom.

THE COURT: Right.

THE WITNESS: Now, if you go to the end of the dayroom, there is a door leading out in the yard. That's where this recreation yard starts.

THE COURT: Right.

THE WITNESS: So you have to diminish that amount from the length of the cellblock. Now, the fence, the further fence, is right at the end of the cellblock.

THE COURT: I see.

Q In other words, if you were to extend the yard out any farther you would need fence on three sides, right?

A That's correct.

Q Don't you actually have one yard at the moment that has fence on at least two sides, that yard up at the front of the institution?

A Yes, we do, yes, we do, and we have it for 25 or 30 inmates, of course.

Q That is for the people in 1-B, right?

A Now the people in 1-A also use it and they are the 25 or 30.

Q Right, and that's got more open fence, I mean more than --

A Yes.

Q More than the others for your most?

A We know, but we have additional officers. We have more officer coverage for that in comparison to the number.

Q I see. It is basically a question of the officer coverage?

A That's right.

No. You start again. It is not basically a question of the officers but you must consider that we could potentially have 140 or 150 inmates in the yard that you are talking about, wherein the most that we can have is 25 or 30 in the other yard.

Q If 130 or 140 inmates all decided to use the yard, you would have a lot of inmates for the size of that yard, wouldn't you?

THE COURT: You would have ten?

MR. BERGER: I meant for the size.

THE COURT: Yes.

MR. BERGER: We don't know the exact square footage here.

Q Now, you have got, I believe you said, two basketball courts in each yard?

A I said we had two.

THE COURT: He said limited size.

A Limited size basketball courts in each yard.

Therefore, averaging four baskets. Now, the inmates on Rikers and in many, many school yards throughout the city do not play full court basketball.

Q As I am aware. Are you saying that each of those four baskets they play four on four games?

A That's right.

Q For a total of 32 inmates engaging in basketball?

A Approximately, yes.

Q About how many inmates play volley ball or can play volley ball at any one time?

A Well, I really am not -- don't know too much about the volley ball game but I would estimate -- I really don;t know how many -- what comprises a time, but I have seen eight or nine people on each side of the net.

Q You said that the yard periods were about an hour and 15 minutes. That includes the time it takes to get the detainees out into the yard and back, doesn't it?

A That's right, but when we have the officers there, as I told you, they go out. It is voluntary. They can go up or they don't go out. It does not take a great number of time if they are eager to get out there. If there are officers out in the yard and stationed they can get out.

Q Doesn't it sometimes happen though that if they are slow getting people out or if they are slow getting

people back in, the period may be considerably less than an hour and 15 minutes?

A That is the exception, not the rule. I mean, like anything else, administering anything, there can be instances that you can point out where things don't turn out right, but the allotted time that we have given is an hour and 15 minutes and the reason that that period of time was taken was to fit it in, and the reason they got four times instead of five times or eight times was that we could fit it into the schedule. This was the -- this was the basis of it. It would make no difference -- let's get something -- it would make no difference if they stayed out there two hours, if we could fit them all into the schedule; but as I told you before, I am deadly against having seven or eight yards running simultaneously.

THE COURT: Are the four days that a cellblock goes to the yard the same four days for all cellblocks or do they vary?

THE WITNESS: No, sir, it encompasses five days. It encompasses five days.

THE COURT: I see.

THE WITNESS: And what it is, your Honor, is that each side goes out four times. We don't let the complete cellblock go out because we realize a yard is too small and

the amount of inmates involved with the amount of officers that we have out there would not be right.

So each half of the cellblock goes out four different times.

Q I gather that they don't go out into the yards on weekends; is that right?

A That's correct.

Q It is a little easier to get people out into the yard than into the gym, isn't it?

A Yes.

Q The yard is much closer to the cellblock than the gym?

A That's correct.

Q About how much time is each gym session did you say?

A Only one hour.

Q That includes travel time to and from the blocks also, doesn't it?

A No, it does not include -- I have to look at the gym schedule. You must realize that we only have the gym from 2:30 p.m., and we must get them back into the cellblock.

THE COURT: From 2:30 until when?

THE WITNESS: From 2:30 to -- I think it says here, I see here looking at it, 8:15 p.m.

Q How many sessions do you run in the gym in a given afternoon?

A Four.

Q Does an entire half a size go to the gym in any given session?

A Yes.

Q And half a side at the moment can be about 140 people?

A Wait just a moment. As many who care to go --

Q Right.

A -- that are in the cellblock at that time can go. I am not saying -- we don't compel the whole half a side to go.

Q If everyone chooses to go it could be as much as 140 or so, right?

A No, because you got to remember at this particular time there are always other institutional services that are operating. Not only the courts are out but those that are gone to clinic, commissary, or whatever the institutional programs, they are not there to go out in the -- and in addition now if they are lined up and it is coming their turn to use the telephone, they are certainly not going to go to the gymnasium.

THE COURT: How are you coming on the phone?

THE WITNESS: Well, we are doing the best we can, your Honor, and I haven't had time, I have been very busy, but I am going to look at it again, and I think we are giving them once in four days. I think we are going to be able, from what my subordinates tell me, we are going to be able to give them once in three days.

THE COURT: A move in the right direction.

Q Warden, you have an Assistant Deputy Warden in your institution named Caldwood, do you not?

A That's right.

Q And is he in charge of the recreational program?

A That's correct.

Q Is he at the sites of the recreational programs more frequently than you are?

A Absolutely.

Q He has an opportunity to observe the number of people who participate; is that correct?

A That's correct.

Q I would like to read to you a statement that Deputy Warden Caldwood made to Judge Lasker in testimony at the previous case Judge Lasker had, and ask you if it sounds right to you. He says, and this is page 216 of the transcript, "And with the gymnasium we only have one gymnasium which we put approximately 50 people in there at one time."

Is that about right as to the --

MR. TOBIAS: Objection, your Honor, Deputy Warden Caldwood is available. He can be called as a witness.

THE COURT: I do not think you ought to stand on technicalities. All Mr. Berger is trying to find out --

MR. TOBIAS: I am sorry, your Honor, I am standing on my objection.

THE COURT: All right, so you are standing on it and I am ruling on it. I am ruling that Mr. Berger can ask Warden Thomas that way or any other way whether he thinks that there are 50 men at a time.

A Yes, I think what Mr. Caldwood is talking about is what we average, what we average in calling and in volunteering. I think -- that's what I think he is talking about. If he -- he did not mean that it is limited to 50.

THE COURT: Incidentally, Mr. Tobias, I do not mean to rule and I do not think Mr. Berger thinks that he is accomplishing this, that is, I do not mean to rule that Caldwood's testimony in the Giampetruzzi case is automatically part of the record in this case, no. It was used as the basis for asking Warden Thomas a question.

Q You are saying that that answer means that only about 50 people go to the gym?

A I am telling you that Caldwood would have to

interpret his own answer, nothing --

THE COURT: Insofar as he refers to 50 people, you think he means that on the average?

MR. TOBIAS: Your Honor, this is objectionable. It is calling for conjecture as to what was in Deputy Warden Caldwood's mind.

THE COURT: That was not the question that was asked. That is the answer that was given. Mr. Berger wants to know whether you would agree with Mr. Caldwood, if Mr. Caldwood sayd, as it seems that he did, literally anyway, that about 50 people at a time use the gym.

THE WITNESS: I would agree.

THE COURT: All right.

BY MR. BERGER:

Q I am sorry, Warden, did you check as to whether or not that travel time to and from the block counts as part of the hour of gym time?

A Will you excuse me just one moment?

(The witness left the stand and returned to the witness stand with a paper.)

MR. TOBIAS: Your Honor, I would like to inform the Court, I think it would be very helpful, that we do have a member of the Department who is in a better position, who has observed these events. As you know, Warden Thomas

is the administrator of the institution.

THE COURT: Right. Well, if you have somebody who knows ---

MR. TOBIAS: We brought somebody down here for that purpose.

THE COURT: All right, we did not know that. At least I did not know it until this moment, so Warden Thomas, why don't you leave it to the witness to whom Mr. Tobias refers to answer that question. You do not care as long as you get the information, do you?

MR. BERGER: No, except unless Mr. Tobias has any direct to do on this and putting him on for the purpose of asking him questions on cross on things Warden Thomas said.

THE COURT: If the warden knows, that is one thing. If he does not know, let's not waste all afternoon trying to get him to answer.

MR. TOBIAS: I would just like to add, in the first place this was not gone into on direct, and in the second place we are going to have somebody who is in a better position to know than Warden Thomas. I don't see the purpose of this.

THE COURT: It is not a question of being in a better position. You either know or you don't know.

THE WITNESS: Well, looking at this thing here,

it gives a period, for instance, from 5:45 to 7 o'clock, which is an hour and 15 minutes and we said they spend approximately an hour in there. Now, the 15 minutes is the travel time.

THE COURT: So it is your belief that they do spend an hour?

THE WITNESS: Spend approximately an hour in the gym, not --

Q In winter that is once a week, right?

A That's correct.

Q Do you have any plans to begin utilizing the yards in winter?

A No, I haven't any plans, Mr. Berger, to utilize the yards in winter; and -- because this calls for added resources.

THE COURT: What added resources does it call for? Would you tell me what --

THE WITNESS: Officers.

THE COURT: What?

THE WITNESS: Calls for officers.

THE COURT: Officers.

How do you get them in the summer? What do you do with them in the meantime?

THE WITNESS: Let's say the officers that are

operating the gymnasium and operating the movies.

THE COURT: They cannot do both?

THE WITNESS: That's correct.

MR. TOBIAS: Your Honor, at this point I had submitted an affidavit to this Court which I think Mr. Berger is going to refer to. I will say that this proposal was considered, as a matter of fact, I had assumed that it was affirmed, when the affidavit was submitted. The Department has reconsidered its position on this and we stand with the program that we have now, and with the additional facilities that both Warden Buono and Warden Thomas have mentioned.

Q Warden, has there been any substantial increase in the number of visitors to your institution in the last couple of months?

A Yes.

Q About how many a day are you averaging now?

A Well, we took a period from December 9 to the 22nd. We had a total of 451 visits from. From December 30 to --

Q Excuse me, how many?

A 451.

Q From December 9 through 22?

A That's right.

THE COURT: This is what, a 14-day period?

THE WITNESS: No, that is a seven-day period. Wait a minute, I am sorry, your Honor, 9 through 15. I am looking at the baby visits and calling -- 9th through 15th was 451.

The 30th through the 5th of January was 756.

THE COURT: 756.

THE WITNESS: That's right.

THE COURT: Quite a change.

Q That is a seven-day period also.

A You have to take --

THE COURT: Am I correct that that week, the week of December 30 is probably a busy visiting week with New Years Eve and so on?

THE WITNESS: It was the day before New Years, but if you remember the date on that order that was taken into evidence there, we eliminated the alphabet --

THE COURT: This is when you began your increased visiting schedule?

THE WITNESS: That's right, plus we got the inmates from the Tombs.

THE COURT: How many did you get from the Tombs, about 350 or something?

THE WITNESS: No, it was about 230 from the Tombs that we got.

Q During that seven-day period you were averaging a little over a hundred a day, is that right?

A That's correct.

THE COURT: Warden, I meant to ask you this. With regard to the non-use of yard in the winter, what is the definition of winter? What months don't you use the yard?

THE WITNESS: We start around May 30 until around October 1.

Q During this period, December 30 through January 5, that you were getting about a hundred a day, around what was the population of your institution running?

A 1400, 1450.

THE COURT: If I am correct, to get back to yards for a moment, if you do not use them from October 1 to May 30, that means you only do use them in the months of June, July, August and September. Does that sound right?

THE WITNESS: Probably we do use them -- we might use them, your Honor, October. You follow me? I am not certain.

THE COURT: Can you tell us?

OFFICER DE PASS: October 15.

THE WITNESS: October 15. I didn't hear you.

OFFICER DE PASS: Around the 15th.

MR. TOBIAS: What is the exact initial date?

THE COURT: Mr. Tobias, what is the name of the man you just spoke to?

MR. TOBIAS: Correction Officer Francis DePass.

THE COURT: All right, thank you.

THE WITNESS: He is one of my recreation officers.

THE COURT: So I assume. Mr. Berger, I am sorry to interrupt you. Go ahead.

Q How many booths do you have working at the moment?

A I don't know. We probably have about 60 working.

Q Do you know an officer named Fleming?

A Yes.

Q Is Officer Fleming the officer who registered visitors at the bridge control area for your institution?

A Correct.

Q If I were to tell you that in the Giampetruzzi case he estimated it would take about 50 visitors per shift would you have any reason to disagree with that?

MR. TOBIAS: Objection, your Honor. The same ground I interposed originally.

THE COURT: Overruled.

That you could take about 50 per shift? You mean that the House of Detention could handle 50?

MR. BERGER: Let me read to the Court the exact testimony --

THE WITNESS: No, Mr. Berger, just a moment. You are saying that let's supposing that I have got 60 booths that are operational, why don't I fill up all 60 of them at the visiting period; right? And I am saying that if I did that, I lengthened the time that the visitors have to

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wait.

Now, we do 40, 45, or whatever the point is, and get a load and give them the visits, and then we go to the next thing. If we stop and wait until we get 80 of them collected up, then it's only going to lengthen the process.

MR. BERGER: Let me read the exact answers Mr. Fleming gave and see if you disagree with them.

MR. TOBIAS: I object, your Honor.

THE COURT: Mr. Tobias, I know you disagree with me, but I have ruled on this already and overruled you. So let us go on.

MR. BERGER: Yes.

Q "Q Mr. Fleming, how many visitors can you send over to a general -- among general population inmates to the House of Detention?

"THE COURT: At one time?

"MS. SMITH: Yes.

"A Approximately 50 at one time. This is including all inmates, not just general population, all inmates."

MR. BERGER: For the record, let me state that there was some question of number of inmates in a special housing unit called 1 -B, in addition to the general popula-

tion of HDM.

Now, later on Mr. Fleming was asked why can you only send over this number, and the answer is:

"A Our visiting area is shared with another institution of adolescents, and we have an excessive amount of telephones and phones that are inoperative that are being repaired constantly so we have a cut-off period of 50 to make sure that everyone has a phone that works and not to try and crowd everybody in. 50 is a fair number."

Q Do you have any reason to disagree with that testimony?

A Yes, I have every reason to disagree with it, with the thing. Now, I told you I figure that we possibly have 20. We always got the situation at times. But the point of it is -- that's not the point. I directed them to cut down on the number they take on one visit in order to try to expedite it, so the people don't wait too long. So if all 80 of them was operational, I would still want them to go to about 30 to 40 at a time and then go to the next period.

Q You said the visiting lasts a half an hour; is that right?

A That's right.

Q You said that at this very high period of visiting, from November 30 to January 5, you had about a hundred a day, is that right?

A Correct.

Q In how many shifts did you take that hundred? How many shifts were necessary?

A Mr. Berger, I really don't know.

Q Usually on the average how many shifts had you been running each visiting period?

A We run approximately four. There have been instances of a fifth one where maybe you would have ten inmates left or something of that sort. If we have to go to 15, we go until every person that was there --

THE COURT: You mean 15 shifts of visitors?

THE WITNESS: That's right. We continue until every person is given the visit, no matter how late it is. Okay? Nobody comes there and is turned away that is registered at the time that they should be.

Q When somebody registers at the bridge control area -- and I assume Officer Fleming calls the institution and tells them the name of the inmate who is being visited, is that correct?

A No, I told you that's not the method we use. I told you that they made out lists, written lists, right?

And one of the transfer officers brings it up and takes it down to the cell blocks.

Q Did that list arrive at the institution in advance of the visitors?

A Yes. Yes. Generally speaking. Maybe five minutes or so, depending if we can get a bus. Sometimes it comes up on the same bus that the people come up on.

But I want to talk about the phone calls. You got one phone down there at the bridge site. Now, they are trying to reach seven or eight cell blocks --

THE COURT: Cell blocks or institutions?

THE WITNESS: No, cell blocks.

THE COURT: You have one phone allotted to you?

THE WITNESS: I have one phone in the registration building, and they are trying to reach and they are going to give this officer ten names, and then when they come up, he's going to say, "No, you gave him the wrong name," and what-not. This way, when we got it printed out there and give it, there can't be any mistake about it. The phone system does not work.

Q So you begin to look for the inmate who is being visited approximately or with in about five minutes or so of the time the visitor arrives at your institution.

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A That's correct. That's correct. And you can readily see, if we are looking for 30 inmates, we can get them out easier than if we were looking for eight.

THE COURT: I don't understand that.

THE WITNESS: We are looking for 30, 30 to 40 inmates, to get them. We can get them and pick them up quicker than we can pick up 80 inmates.

THE COURT: Oh, 80. I think you said eight.

THE WITNESS: No, 80. You see, there are 80 booths.

THE COURT: I do understand now.

Q Warden, I would like to read you a statement with regard to optional lockout and ask whether this would represent the situation at your institution.

"During the peak hours of the day there is a lot of movement of inmates to court, returning from court, counsel visits, special visits, probation parole interviews and the like. If an inmate chose to lock in in one of those cells it would add another burden on the busy officer. He would have to locate the inmate, cause more noise in the institution trying to get his attention, and when he found out where he was he'd have to go to that area to lock him out."

Does that basically describe the problem that you have?

MR. TOBIAS: Objection, your Honor. Who made the statement?

MR. BERGER: I don't have to reveal that at this point.

THE COURT: Mr. Berger could ask it on his own.

MR. TOBIAS: He is asking --

MR. BERGER: Mr. Tobias, please.

MR. TOBIAS: He is asking the witness to read somebody else's mind.

THE COURT: He is not.

MR. BERGER: I am not.

THE COURT: He is asking if that describes the situation at Rikers Island or it does not.

A Yes. Except to add if someone comes to get a man to go to school or someone gets to get him to the gymnasium, if someone comes to get him to go to visits, if someone comes to get him to go to any of the service areas, this adds to or in addition to what has already been.

Q You are right. In other words, Warden D'Elia left that out in his description of the Tombs?

A That's right. A great number of things are

occurring during the lockout periods on weekdays, and this is the point, and the only reason why we don't give them optional lockout.

Q How many officers do you have for a block during these busy periods?

A Four.

Q Where are they stationed, did you say?

A Well, they have an A, B, C and D post.

Q And where is each of those officers on that post?

A The officer is up at the front of the block, the B officer on the B side, the C officer is on the C side -- on the A side, and the D officer has a roving thing between the day rooms and what you call them. However, on the 16th of the month, when we lose the services of the assistant counselors or correction aides, that officer is going to have to monitor this telephone.

Q So at that point you are going to have only one officer patroling each side?

A That's correct.

Q During these busy periods.

A That's correct.

Q Would you have any objection if you were to have two more officers on each side?

MR. TOBIAS: Objection, your Honor. This is irrelevant.

MR. BERGER: I think it is extremely relevant.

THE COURT: Are you asking whether he would have any objections or whether that would enable him to have an optional lockout?

Q Let us take the case of optional lockouts. Suppose you had an officer stationed at the other end of your 318-foot corridor.

A I think that that is an unfair statement. Any Warden worth his salt always wants more people.

THE COURT: Assuming, therefore, that you did have them, would that cure the problem that you just described?

THE WITNESS: Where I could let them have optional lockouts?

THE COURT: Yes.

THE WITNESS: Judge, I am going to tell you something. You can have the extra officer. You are going to get a guy and he is asleep or doing something like that, you got problems getting him up and getting him out, there is delays, I don't care what you said if you had 20 officers with some of them -- now, you have to base everything, it's sad to say, on the least common denominator. You cannot

base it on the average. The average inmate we don't have any problem with. But when you do get a guy with a problem and then you got somebody waiting up there, you got ten fellows in the hall waiting to go to the visits, and here we are waiting for this guy, who he is going to take his time to put on his clothes or what-not to get out. And this is the situation. I think if the inmates would stop and think about it, and think about their own interests and all of the things that they want to happen on there, I think that even from their viewpoint it is better. After all, don't forget that the two periods that this is occurring are only two-hour periods.

Q Warden, the example you just gave of the ten fellows waiting to go down to the visit, why can't you bring them down to the visiting house and bring the other fellow down later?

A Because now you get into a squabble as to what time the visit started and how long did they have, and a whole lot of other things.

Q Wouldn't one problem be that you would have to get another officer to bring him down specially?

A No. If we got 15 or 20 inmates, they are all going to get down there and they are all going to start the visiting period at the same time. Because you get

into arguments not only with the inmates, you get into arguments with the visitors. You let her stay in longer than the others. You got to remember, you haven't got little compartments. If someone sees the other person there and say, "Well, they were there longer" -- right?

Q Well, she would be waiting because the inmate she is visiting took a little time getting down there. It would not be your fault, would it?

A You don't understand. If you had five inmates that started at 2 o'clock and you got five more that started at 2.10, and you got five more that started at 2.15, you are going to get into a whole lot of trouble when it comes time for them to be in there half an hour. Because they are going to be arguing about the time. This way everybody finishes at the same time and they come out.

Q The reason I ask that question about two officers down at the far end of either side in a more general fashion is because we are also dealing with lockout schedules here, and in general the question of staffing has come up on almost every issue, which is why I ask you:

Wouldn't you like to have those two officer posts?

THE COURT: I am willing to take judicial notice of what the Warden and other Wardens have told me. Of

course they would like to have them. The question is not just whether they would like to have them; the question is whether that would cure the particular problem you are discussing.

Q Warden, is it not true that you are understaffed at the moment?

MR. TOBIAS: Objection, your Honor.

THE COURT: Overruled.

MR. BERGER: There is nothing objectionable about that.

Q You are under oath. Be honest about it.

MR. TOBIAS: Your Honor, I object to that.

THE WITNESS: Hold on, hold on.

THE COURT: Mr. Berger --

THE WITNESS: I am under oath now. Don't tell me to be honest.

THE COURT: Right.

THE WITNESS: What are you talking about here? I tried to be as candid as I can. Don't tell me about being honest.

Q I apologize for it. Aren't you undersized at the moment?

MR. TOBIAS: Objection, your Honor.

THE COURT: Overruled.

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MR. TOBIAS: There has to be a determination of what is meant by understaffed. Unless Mr. Berger breaks this down, I don't think there can be a responsive answer.

THE COURT: Overruled. If a man has been in this for 25 years and cannot understand that question, I don't know who can.

A Yes, I am understaffed.

Q Isn't it going to be worse when you lose the aides?

A Yes.

THE COURT: By definition it is worse.

Q Warden, I would like to --

A I wish you would save them.

THE COURT: I wish you would too.

A You would really be doing something.

Q Warden, you are a mindreader.

THE COURT: When are they scheduled to depart?

THE WITNESS: What?

THE COURT: When are they scheduled?

THE WITNESS: The 16th of the month.

THE COURT: How many do you have?

THE WITNESS: I have about 19 of them, and it is going to cause all kinds of problems for me when I lose them,

because I am going to have to have custodial officers take their place. This is the only thing, the only type of ploy you have to do it.

MR. BERGER: Your Honor, may I state that we do intend to request a conference with you before the close of business today to discuss this problem. It is a very serious problem. It is one that our office intends to move on next week. We would like to at least initially discuss it with you before the close of business today. Will that be possible, your Honor?

MR. TOBIAS: Since Mr. Berger has raised it, I wonder if the Court would mind hearing my feelings on this. We were prepared today to discuss the very points raised in the plaintiff's proposed judgment. This was not a point that was raised. This is not related to this lawsuit.

THE COURT: I take it that Mr. Berger means talking in the robing room, not as part of this case.

MR. BERGER: Yes, absolutely, your Honor.

MR. TOBIAS: I don't understand what purpose it would have, since this Court does not have jurisdiction over that issue anyway.

MR. BERGER: Your Honor, I think it does, and that is what I want to discuss in the robing room.

THE COURT: I take it they are going to ask me

to do something and you are going to say I don't have the right to, and I probably am going to say I have the right to and I won't, and it will go round and round like that.

In any event, I would like to finish the Warden's testimony and give him the option to go home on a late Friday afternoon.

THE WITNESS: Thank you.

No, I am going to go back to the Island.

THE COURT: Well, wherever, get these lawyers out of your hair.

Q Warden, I forget whether I asked you this or not, so let me just repeat it:

There aren't any gym periods on weekends, are there?

A No, sir.

Q There is fewer staff in the institution on weekends, is that correct?

A That's correct.

Q What is it, two officers per block?

A No, there's four officers. There's always four officers per cell block from 5 o'clock in the morning until 10 o'clock at night.

Q I see.

A Of the regulars.

Q Overall you have less staff on weekends.

A That's correct.

Q The night shift from 10 o'clock to 5 in the morning, then you have only two officers, is that right?

A That's correct.

Q Per block.

A That's correct.

Q Finally, Warden, I would like to read you a statement and ask whether you agree or disagree with this statement. The statement is:

"Most detainees can be safely held in custody under less than maximum security conditions."

Do you agree?

MR. TOBIAS: My objection for the record.

Q Do you agree or disagree with that statement?

A I agree with that statement, but the difficulty comes in defining in having -- and no institution anywhere in the United States that I know of has an adequate classification that can identify the inmate that is the dangerous one. Now, there are some exceptions, that we will go to the case of 1-B, where maybe there is demonstrable evidence. But I am speaking about a man comes in, he is arrested and he walks in to us. We know nothing in the world about

him. He may or may not have a NYSIS sheet with him. We know not a thing about it.

Now, we don't know where to house him, how to house him, or anything. Now, you get the sentenced inmate, where you get a detailed probation report, where the investigators have gone into his background and what-not. We don't have any of that. So now when you start to talk about it in relation to that ...

MR. BERGER: No further questions.

MR. TOBIAS: No redirect, your Honor.

THE COURT: Very good. Thank you, Warden. Have a nice weekend.

THE WITNESS: Thank you, sir.

MR. TOBIAS: We have one further witness.

THE COURT: Only one further? How long --

MR. TOBIAS: At this time.

THE COURT: Let me see counsel in the robing room, not on the question Mr. Berger raised, but on the question as to the completion of this hearing.

(Recess.)

THE COURT: Gentlemen, it is obvious we will not finish this afternoon. We will finish on Monday morning. The hearing is adjourned until 10 o'clock on Monday morning.

I am asking the Marshals please to do their very best to get the witnesses here by 10 o'clock on Monday morning, because they or some of them anyway will actually be needed very early in the proceedings in order to testify.

I will see counsel in the robing room again.

(An adjournment was taken to Monday, January 13, 1975, at 10.00 o'clock a.m.

JAMES RIHH, et al.,
Plaintiffs,
vs. 70 Civ 3962
BENJAMIN J. MALCOLM, et al.,
Defendants.

January 13, 1975
10:25 a.m.

THE COURT: Is Mr. Brickman going to testify for the plaintiff?

MR. BERGER: That is correct, your Honor.

THE COURT: All right, Mr. Brickman, will you come up, please.

J O H N M . B R I C K M A N , called as a witness by the plaintiffs, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BERGER:

Q Mr. Brickman, what is your current position?

A I serve as Executive Director of the New York City Board of Correction.

MR. BERGER: Your Honor, I believe there is already in the record numerous times what the Board of Correction is.

THE COURT: I think it is. And Mr. Brickman's background is in the record either in this case or the other. We do not have to spend time on it.

Q Mr. Brickman, in your capacity as Executive

Director of the Board of Corrections did you recently undertake a survey of visiting facilities in the various New York City prisons?

A Yes, I did. Survey in terms of numbers, not a physical survey.

Q Yes. As to the visiting capacity of each institution.

A That is correct.

THE COURT: You just checked to find out what the visiting capacity is?

THE WITNESS: Exactly correct.

Q Could you report to the Court the figures that you found?

A Yes. What we did was to check with each institution to determine the number of visiting booths that it had. This information was gathered on Thursday, the 9th of January, so presumably it is correct as of that date.

Q Mr. Brickman, in stating to Judge Lasker the amount in each institution would you be able to relate that to the current population of the institution?

A If I had before me a population sheet, whether a weekly or a daily.

Q Yes.

A Thank you.

MR. BERGER: This is going to be marked for identification.

THE COURT: Bring it over to the clerk.

(Plaintiff's Exhibit 1 marked for identification.)

THE COURT: Are the parties agreed as to what that document is?

MR. BERGER: Pardon me, your Honor. May I have this one marked as Exhibit 2?

(Plaintiff's Exhibit 2 marked for identification.)

Q It may simplify things for me to ask, Mr. Brickman, from whom do you receive those reports?

A Those reports are forwarded to our office as they are issued by the Department of Corrections itself, I think from the office of operations.

THE COURT: Show it to him so he can verify whether those are received from the Department of Correction.

Give them to Mr. Berger so he can show them to the witness.

THE WITNESS: These are the documents in question.

THE COURT: For what date, Mr. Brickman? No. 1 is what?

THE WITNESS: No. 1 is a daily inmate census dated

January 3, 1975. No. 2 is a daily inmate census dated January 6, 1975. And there is also a third document that differs from the first two that is not yet numbered which I think may be relevant as well.

MR. BERGER: We were going to put that together with Exhibit 1. Maybe we should keep them all separate.

THE WITNESS:. The third document is a weekly summary dated January 3, 1975.

THE COURT: What is the title?

THE WITNESS: It may have a somewhat different title. We call it a weekly summary.

MR. BERGER: Number of cases in the Supreme Court based on inmate analysis January 3, 1975.

THE WITNESS: Your Honor, the reason we call it a weekly summary is the second page is the same thing for Criminal Court. That is not the title of the entire three-page document. And the third page relates to other information.

THE COURT: That is for what period?

THE WITNESS: This is based on Plaintiff's No. 1, the daily, based on the daily information for January 3, 1975. The reason we call it a weekly summary is it is only prepared once a week, not on a daily basis.

THE COURT: In any event, all those three documents

I understand you to say were received from the Department of Corrections?

THE WITNESS: That is correct, your Honor.

Q Mr. Brickman, I would like to run down each of the defendants' various prisons and ask you to state first the number of booths available and then the population information for those institutions on January 6 and January 3.

A Very well.

MR. TOBIAS: Your Honor, I object to the latter figures being offered in evidence based upon that sheet.

THE COURT: What do you mean by latter figures?

MR. TOBIAS: The population figures of the institution. Mr. Brickman didn't conduct those surveys.

THE COURT: I know he did not.

MR. TOBIAS: I have no way of knowing whether those sheets are authentic or not.

THE COURT: He said as the Executive Director of the Board of Corrections that it is the custom for the Board of Corrections to receive these from the Department of Corrections. I think that there is a clear presumption that they are accurate. If you wish to check out and you find that they are not accurate, then bring it to my attention.

MR. BERGER: Thank you, your Honor.

THE COURT: Why do you have to have it for both January 3 and January 6?

MR. BERGER: January 6 is a Monday, the highest population day of the week and I would like to put in another date as well so we can have a representative sample.

THE COURT: All right.

Q Let's start with the Brooklyn House of Detention, Mr. Brickman; how many booths do they have there?

A We understand there are 54 booths in the regular visiting house as it is called and one special booth elsewhere in the institution for special visits.

Q What are the population figures for the Brooklyn House for January 6th and 3rd?

A On January 6 the Brooklyn House of Detention held 794 inmates. And, your Honor, when I use the phrase "inmates" here I refer to both pretrial detainees and sentenced inmates.

THE COURT: You use --

THE WITNESS: Unless I specifically make an exception I am using the same in all cases.

THE COURT: It seems to me for visiting purposes we should count all the bodies in the place.

MR. BERGER: Yes, your Honor.

THE WITNESS: At the Brooklyn House of Detention on January 3 there were 782 inmates.

Q How about the Queens House of Detention?

A At the Queens House of Detention we were informed that there were 40 visiting booths. The population on January 6 was 614. On January 3 it was 601.

Q How about the Bronx House of Detention?

A We were informed that the Bronx House has 57 visiting booths. On the 6th of January the population was 457. On January 3, it was 453.

Q How about the adolescents?

A Yes, there are 75 visiting booths in the normal visiting area at the ARDC and there are also two special visiting booths at that institution. On January 6 the population was 949. On January 3, the population was 905.

Q How about the Womens House of Detention, otherwise known as the New York City Correctional Institution for Women?

A At the Correctional Institution for Women there are 42 visiting booths. Now, on January 3, the total population of the Womens Institution was 364, but, your Honor, at this point I think in the interest of full understanding it might be useful to point out that of those 364, 120 were sentenced inmates, most if not all of whom do have contact rather than booth visits. So the visiting booths served on January 6, if you will, a detention population of 244. The

same numbers or the figures for January 3 were a total of 353 inmates, 234 of whom were pretrial detainees.

THE COURT: How many?

THE WITNESS: I'm sorry, did I say 234 were pretrial detainees?

THE COURT: All right.

Q By the way, Mr. Brickman, does the survey indicate the inmate capacity of the contact visiting areas of the Womens House?

A No, it does not. We can get that information but it did not at this instant.

Q Have you ever been in that particular area of the Womens House of Detention?

A Several years ago.

Q Could you give the Court a rough estimate or would you prefer not to?

A I prefer not to trust my recollection. That is a very long time ago.

Q Mr. Brickman, how many booths are there for the New York City House of Detention for Men and the Adolescent Detention Center combined?

A We were told there were 80.

Q Were you told anything in particular about those booths?

A Yes, we were told at that institution that some percentage of telephones in the visiting booths are not operative.

THE COURT: Did you make an inquiry about the other buildings?

THE WITNESS: We didn't make an inquiry, but it has been my understanding based on having seen it at the Manhattan House of Detention and having been told it at least in the past with respect to other institutions that that problem is generally throughout the department.

THE COURT: It is my understanding, too. Have you any reason to believe the problem is more acute at the House of Detention for Men facilities?

THE WITNESS: Let me put it this way. I would suspect the problem is less acute at a place like the Adolescent Detention Center which is a year and a half old and the question is newer.

THE COURT: That really does not answer my question.

Q Mr. Brickman, on January 3 what was the population of the House of Detention for Men?

A On that date the population was 1,385.

Q On January 6?

A On that date the population was 1,493.

Q And on January 3 the population of the Adolescent

Detention Center?

A The population on that date was 567.

Q And on January 6?

A The population was 572.

MR. BERGER: No further questions.

CROSS EXAMINATION

BY MR. TOBIAS:

Q Mr. Brickman, I take it you have never run a Corrections institution, is that correct?

MR. BERGER: Objection. This is not relevant to the testimony.

THE COURT: Sustained. All he is doing is reporting figures, Mr. Tobias.

Q Mr. Brickman, have you observed the visitation process at the New York City House of Detention for Men?

MR. BERGER: Objection.

THE COURT: Will you restrain yourself to the material on direct. Objection sustained. He is only telling us what the figures are.

Q Mr. Brickman, has your organization attempted to ascertain how many booths were in use during the visitation hours at the Queens House of Detention for Men?

A No, we have not.

Q Has your organization attempted to ascertain how

many booths were in use during the visitation hours of the Brooklyn House of Detention for Men?

A No.

Q The same question with respect to --

THE COURT: Why don't you just ask him the general question?

Q With respect to all the institutions that you named, did your organization attempt to make such an evaluation?

A No, with the exception of the fact that I do have -- I have asked the staff at the HDM to give me a rundown on the numbers of visits over the last several months to analyze the pattern since the move of inmates from the Tombs. I haven't received that yet, but that is the only --

Q Mr. Brickman, do you know how many visits are permitted inmates at the Brooklyn House of Detention for Men?

MR. BERGER: Objection.

THE COURT: Sustained. It is a waste of time. All he testified to were the figures.

MR. TOBIAS: I want to show whether or not the figures are relevant and I think I can find in this manner.

THE COURT: That is for me to decide. I know how many visits are possible. I heard it all Friday.

MR. TOBIAS: Your Honor, I do not believe you know

the visitation hours at the Brooklyn, Queens and other institutions.

THE COURT: Excuse me, okay.

Q Do you know how many hours a week inmates are entitled to visit or receive visits at the Brooklyn House of Detention?

A No, I do not.

Q Same with respect to the other institutions.

A I have some sense of the --

Q I want to know whether you know specifically, Mr. Brickman.

A I don't remember exactly.

Q Mr. Brickman, I take it you heard Warden Thomas' testimony with respect to the visitation hours at HDM?

A No, I did not.

Q Do you know whether these visitation hours are fewer or greater than the visitation --

MR. BERGER: Objection, your Honor.

THE COURT: Really, Mr. Tobias, his knowledge of the facts is irrelevant to me. If you want to put those facts before me, put them before me properly. To all inmates Mr. Brickman has acted purely as a conduit today with respect to certain mathematical facts.

MR. TOBIAS: Your Honor, no further questions.

MR. BERGER: No redirect.

THE COURT: Thank you, Mr. Brickman.

THE WITNESS: Thank you, your Honor, I appreciate your hearing me.

(Witness excused.)

THE COURT: All right, gentlemen, I will be in chambers. I am sorry to have to ask you to wait. As soon as any witness arrives I will return.

(Recess)

MR. BERGER: I call Miss Davis to the stand at this time.

D E B O R A H D A V I S, called as a witness by the plaintiffs, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BERGER:

Q Mrs. Davis, could you state your address, please?

A 2420 Morris Avenue, Bronx, New York.

Q Are you married?

A Yes, I am.

Q What is your husband's name?

A Norman P. Davis.

Q Do you have any children?

A Yes, I do.

Q How many?

A Two.

Q How old are they?

A Seven and eight.

Q Mrs. Davis, where is your husband residing now?

A My husband is in the New York City House of Detention for Men.

Q Is he a pretrial detainee?

A Yes, he is.

Q When was he arrested?

A October, 1974.

Q When he was first arrested at what facility was he incarcerated?

A He was at the Tombs.

Q Did you visit your husband at the Tombs?

A Yes, I did.

Q How did you get down to the Tombs from where you live?

A By subway.

Q About how long did it take?

A About half an hour.

MR. TOBIAS: Objection, your Honor. I do not believe this is relevant to the issues under litigation at this hearing.

THE COURT: I believe it is quite relevant. Overruled.

MR. TOBIAS: I believe the relative access of Rikers Island as opposed to the Tombs is not something we are discussing here.

THE COURT: Mr. Tobias, my recollection is it is, under the requests of the plaintiffs that the visiting hours at Rikers Island be --

MR. TOBIAS: That is a separate question. With all due respect, it is a separate question. Whether or not the visiting hours at Rikers Island should be expanded, the issue is distinct from whether or not it is accessible or not.

THE COURT: I fail to see it in this limited way, Mr. Tobias. It is not going to hurt if I hear it. I know it takes longer to get to Rikers Island than the Tombs.

MR. TOBIAS: We are not prepared to come forward with evidence on that issue.

THE COURT: Come on, you can question this lady without big preparations. Do not make a fuss about it. If you want to, you can.

Q Mrs. Davis, how long does it take to get down to the Tombs?

THE COURT: She said a half hour.

MR. BERGER: Half hour, thank you.

Q How frequently were you permitted to visit your husband at the Tombs?

A Every day.

Q Does that include Saturday and Sunday?

A No, except Saturday and Sunday.

THE COURT: Every day except Saturday and Sunday.

Q How frequently did you in fact visit him?

A Every day.

Q How long was each visit permitted to last?

A 45 minutes.

Q Mrs. Davis, now that your husband is on Rikers Island, do you visit him there?

A Yes, I do.

Q How do you get to Rikers Island from your house?

A I have to board a train and then from there I have to catch a bus.

THE COURT: A train from 59th Street?

THE WITNESS: No, I take a train to Queens Plaza from my home. That is the "D" train.

Q That segment of the trip from your home to Queens Plaza, about how long does that take?

A About 45 minutes.

Q At Queens Plaza you take a bus?

A Yes.

Q And how long does it take for that bus to get to Rikers Island.

A About a half hour.

Q Does the bus run at particular intervals?

A It runs about every half an hour.

Q The particular times at which you try to catch --

A If I miss the bus when I get there I have to wait for the next bus which takes another half hour.

Q Thank you.

How long does it take for the bus to get to Rikers Island?

A From Queens Plaza about a half an hour, 20 minutes to half an hour.

Q Once you get to Rikers Island what happens then?

A That is when I got off the bus. I have to get a number and then I have to be seated.

Q About how long do you remain seated?

A About an hour, two hours maybe. It all depends.

Q What happens after an hour or two hours?

A They call out the numbers.

THE COURT: What time do you normally arrive over there, Mrs. Davis?

THE WITNESS: I usually arrive there between 10:30

and 11 o'clock.

Q After an hour to two hours they begin calling the numbers?

A Yes, calling the numbers in 10's.

THE COURT: In groups of 10 you mean?

THE WITNESS: Yes.

Q What do you do when your number is called?

A You have to go up and tell the man who you want to visit. You sign it and then you are seated.

Q Seated again?

A Yes.

Q How long do you remain seated at that point?

A For about another hour.

Q What happens then?

A Then you are called up again. Then you sign the book and get the pass and go through the turnstile.

Q What happens at that point?

A You are searched and then have to be seated again and wait for the bus.

Q How long do you remain seated at that time?

A Maybe 10, 15 minutes.

Q Then when you get on the bus you go to the House of Detention for Men, is that correct?

A Yes.

Q What happens there?

A Then you wait there for 45 minutes or longer for your visit.

Q Do you have to sign in again then?

A No.

Q Are you searched again?

A You are searched just before you go to the visit.

THE COURT: What does the search consist of?

THE WITNESS: You have to open the pocketbook and you are searched with a metal detector.

Q By the way, once you arrive at the Tombs about how long do you have to wait for your visit to begin?

A About a half an hour.

Q Now, once your visit begins how long do they permit the visit to last?

THE COURT: At the House of Detention?

Q At the House of Detention for Men?

A A half an hour.

Q Have you ever had a visit that was less than a half hour?

A Yes, I have.

Q Will you explain to the judge how that happened?

A Well, you are assigned to a booth. If your phone is not working, you know, you have to get another phone.

But now they have a different system where you have to get a booth number and if that booth is not working then you have to go out and ask for a change and that includes your visit, you know, that is within the time of the visit. Or if your husband is not down for the visit you have to wait until they bring him down, but that is still included in your half an hour.

Q If your phone doesn't work are you allowed to change booths?

A You have to ask first.

Q If you ask are you permitted to?

A It all depends on how crowded it is.

Q When the visit is over, what do you do at that point?

A You just go out and wait for the bus to take you back to the reception area.

Q About how long is that?

A Maybe 15 minutes or a half hour. It all depends on how quickly the bus comes.

Q Once you get to the reception area what happens?

A Then you pass through the turnstile and if there is a lot of people boarding you have to wait for the next bus to return home.

Q Are there usually a lot of people?

A Yes, there are.

Q Mrs. Davis, how often do you visit your husband on Rikers Island?

A Twice a week and every other Sunday.

Q Have you been going more frequently, four days a week?

A No, only on days that he goes to court and if that falls in the day I usually go then I go on another day.

Q Are you aware that they recently expanded the visits from two to four days a week?

A Yes, I am.

Q Why can't you go four days a week?

A I can't go four days a week because it takes all day.

Q If on the days you do go you were allowed to stay longer than a half hour would you stay longer?

A Yes, I would.

Q If you were allowed to visit on Saturdays and Sundays each week would you do so?

A Yes, I would.

Q Mrs. Davis, how are you presently supporting yourself?

A I am supported by both my families.

Q Do you have any plans to begin working in the

future?

A Yes, I do.

Q About when is that going to be?

A End of March.

Q How are you going to visit your husband then?

A I will be only able to visit him every other Sunday.

Q If there are visiting hours in the evening would you visit him in the evenings?

A Yes, I would.

MR. BERGER: No further questions.

CROSS EXAMINATION

BY MR. TOBIAS:

Q Mrs. Davis, you testified that you arrived at the Rikers Island facility at between 10:30 and 11 o'clock, is that not correct?

A Yes.

Q Have you ever arrived at the facility at any different hour?

A No, I haven't.

Q Have you received any instructions as to the time that you are permitted to enter the Rikers Island facility to visit your husband?

A Yes.

Q What are the hours you are permitted to visit?

A It states the visiting hours are from 12 to 2.

Q What times does it say you are supposed to arrive on the Island?

A Before 12 o'clock.

Q Now, you stated that you have to wait once you arrive at MDM about 45 minutes or longer to see your husband, is that not correct?

A Yes, that's right.

Q And you only had about a 30-minute wait at the Tombs?

A Yes.

Q Does this 45-minute period or longer period that you have indicated, does this include your being searched and other processing and activities that go on?

A No, it doesn't.

Q In other words, you are adding other time to being searched and being processed?

A Yes.

Q Do you ever bring your husband money?

A Yes, I do.

Q And what happens with the money?

A When you come in you have to leave the money at the booth.

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THE COURT: Does that take long?

THE WITNESS: No, it doesn't, just a few minutes.

THE COURT: The search does not take very much longer, does it?

THE WITNESS: No, not to enter.

THE COURT: Do they search you more thoroughly when you go? What do you mean, not to enter?

THE WITNESS: Because you are going to visit.

THE COURT: Is there another search when you leave?

THE WITNESS: No, there is not another search when you leave.

Q Mrs. Davis, while you are waiting to see your husband are there other people being searched?

A Yes, everyone is searched at the same time.

Q You are not required to wait while other people are being searched?

A Yes, I am, while I am on line to go in to the visiting booth, yes.

Q In other words, everybody is not searched simultaneously?

A No.

Q Mrs. Davis, at the Tombs was there ever any occasion in which your phone did not work?

A No.

Q How many times has your phone at the Rikers Island facility been in disrepair?

A Several times.

Q Out of how many times?

THE COURT: Am I right we do not need to worry about that any more?

MR. TOBIAS: No, your Honor. Well, the contacting program will be spelled out for you later.

THE COURT: Is there going to be contact visiting by telephone?

MR. TOBIAS: No, there will be a combination.

No further questions.

THE COURT: Anything else?

MR. BERGER: I just wanted to clarify something about the searching process.

REDIRECT EXAMINATION

BY MR. BERGER:

Q When was the first time you were searched on Rikers Island?

A Through the turnstile.

Q That is in the reception area?

A Yes.

Q Then are you searched again at the institution?

A Yes, you are.

THE COURT: Is it the same kind of search in both places pretty much?

THE WITNESS: Yes.

Q Is there a kind of a metal detection device that is used?

A Each time, yes.

MR. BERGER: No further questions.

THE COURT: Thank you, Mrs. Davis.

(Witness excused.)

THE COURT: Can I see counsel in the robing room? We will discuss in more detail what the contact visits are.

(Recess)

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AFTERNOON SESSION

2:10 p.m.

(Trial resumed.)

THE COURT: Mr. Tobias and Mr. Ritholtz, I had a report to me by the United States Marshal on what seems to be incredible mismanagement about bringing the witnesses to me today.

I am going to speak to the warden about it and I think you should speak to whoever you want to. If this is an illustration of the way the City solves a problem about bringing in people to the State courts, there is going to be chaos.

I realize the weather is bad today, but it is absolutely incredible that witnesses who were supposed to be in court at ten o'clock finally arrived at two o'clock.

Proceed with your witnesses, please.

MR. NUSSBAUM: I call Officer Francis De Pass.

F R A N C I S D E P A S S, called as a witness by the Defendants, being first duly sworn; testified as follows:

DIRECT EXAMINATION

BY MR. NUSSBAUM:

Q Officer, how long have you been with the

Department of Corrections?

A Thirteen years.

Q In what capacity do you now serve in the Department?

A I am on the recreation staff.

Q How long have you been on that staff?

A Three years.

THE COURT: Three?

THE WITNESS: Three years, Judge.

Q Officer De Pass, as recreation officer, are you familiar with the recreation program at the House of Detention for Men?

A Yes, I am.

Q Will you describe those programs to this Court?

A Well, in the winter time, we have gym, which allows them, the population, to go once a week for one hour. That was half of a block.

THE COURT: Well, I don't care if it is half a block or six blocks, does it come down to the fact that a man can go to gym one hour per week if he wishes to?

THE WITNESS: Yes.

THE COURT: But that is all?

THE WITNESS: That is it.

THE COURT: Right.

MR. NUSSBAUM: That is in the winter time.

THE COURT: I understand, but the winter time is a good time.

Q Will you describe the facilities in the gym for the Court?

A Well, you have -- in the gym we have basketball, our main thing; we have a ping-pong table and we also have a weight room.

THE COURT: Weight?

THE WITNESS: Weight room where they lift weights.

THE COURT: But whatever it is that you do, it is the one hour, right?

THE WITNESS: That is it.

Q When it comes time for one block or one part of a block to go to gym, how many potential inmates do you have that could attend the gym period?

A Well, everyone that side of the block.

Q How many inmates is that?

A We get about fifty from one-half of the block.

Q That is fifty out of how many? How much is that half of a block?

A It depends. Maybe a hundred people in there, maybe more.

Q Inmates that do not participate, I assume some of

them are going to court so they wouldn't participate?

A No.

Q Can you attribute the lack of participation to anything else?

MR. BERGER: Objection.

THE COURT: Sustained. Officer, don't answer that question.

You can answer another question, if he has a knowledge as to why they don't participate, if he has any knowledge.

Q Do you have any knowledge, Officer, as to why the men fail to participate?

A No. I know the ones that do participate really participate; they enjoy gym.

Q For those that do participate, are they all able to participate in the various activities?

A Yes. They seem to enjoy it, as far as my knowledge is. They seem to enjoy gym.

Q What happens in the warmer weather?

A In the warmer weather, we have yards and the yards are -- being that we have three yards together simultaneously, they can get out there four times a week.

Q For how long?

A For about an hour and fifteen minutes each yard

period.

Q Do they enjoy the entire hour and fifteen minutes for the yard period?

A They seem to.

THE COURT: I don't know what you mean. You used the word "enjoy" there.

Did you mean do they have a good time?

MR. NUSSBAUM: No, your Honor.

Q Are they able to get the benefits of the whole hour and fifteen minutes in the yard?

A Oh, yes, you know, there are games, basketball games. On some courts we have very good players. You have to wait and you do have quite a few good players.

THE COURT: I think Mr. Nussbaum means to ask you, do they spend the whole hour and a quarter out there, or some of that time is spent coming and going?

THE WITNESS: No, most of them stay out there, you know, the whole period.

THE COURT: In other words, you are not measuring door-to-door? It doesn't take very long for them to go out anyway, does it?

THE WITNESS: No, because the yard is right there.

Q So any inmate who wants to go out can just go out?

A Yes.

THE COURT: Let's get the sense straight.

Q I want to know when that begins. When does the yard period usually begin, what time of the year, where exactly?

A This year it started -- the exact date was June 3rd, and we started gym period -- October 7th, it ended.

THE COURT: How do you decide when to begin and when to stop? Did you make the decision?

THE WITNESS: I have no say so.

THE COURT: Do you know how the decision was made?

THE WITNESS: The program director and the security deputy and the warden get together and they administer this program.

THE COURT: Thank you.

Q Can you describe the facilities that you have in the yard that these inmates can use?

THE COURT: If you can, briefly, I have seen the yards. I heard the warden tell about it the other day.

A We have about four baskets and volleyball, benches on the side of the block.

Q Approximately how many inmates participate in the yard activities from a block?

A About fifty. We get about fifty out there.

Q And the same 140 approximately, 120?

A Yes.

THE COURT: Is this from a block or from half a block when you say fifty?

A This is from a block, you know. Most of the young men, you know, play a lot of ball.

THE COURT: Yes, but I would think you get more than fifty.

You say in half a block, there are about 100 people. In a block at the present time, they are up to about as many as 300 people?

THE WITNESS: Yes.

MR. TOBIAS: The officer referred to side and block interchangeably.

THE WITNESS: A side, not --

THE COURT: Ahalf a block is a side?

THE WITNESS: Yes.

THE COURT: Does each side go out separately?

THE WITNESS: Yes.

THE COURT: So you mean about fifty out of a hundred?

THE WITNESS: That's right.

THE COURT: Let me ask you this: If all

hundred or most of them came out to the yard in the summer, could you take care of them?

THE WITNESS: I think so.

THE COURT: What would they do?

THE WITNESS: There is no limitation. No one is stopped from going.

THE COURT: You could out the door. There wouldn't be enough facilities for all of them?

THE WITNESS: Yes, probably they wouldn't all get a chance to participate.

THE COURT: They might enjoy the fresh air?

THE WITNESS: That's about it.

THE COURT: Yes.

Q Just one final question for the record, Officer. Is it true thatyou have six baskets in the gym?

A That's right.

Q And in the yards --

A Four.

MR. NUSSBAUM: That's all.

CROSS-EXAMINATION

BY MR. BERGER:

Q Officer, I have just a few questions.

Part of your work involves storing the recreational equipment?

A Yes.

Q Can you tell me roughly how many basketballs you have at the institution?

A We have, I guess, about -- I really can't answer that. I don't know how many we have in storage. I know we do have some in storage; say about forty or fifty.

THE COURT: In storage?

THE WITNESS: In storage. After you use the ball in the yards, you know, they generally wear out.

THE COURT: Is that what you mean when you say in storage? They are used ones that have been put aside or what?

THE WITNESS: Yes, we have used and new.

THE COURT: The total of the used and the new in storage is somewheres between forty and fifty?

THE WITNESS: Forty and fifty.

Q You don't know how many of those are used and how many are new, do you?

A No, I don't.

Q You said in the gym there are six baskets, is that correct?

A That's right.

Q How many men play at each of those baskets?

A It is eight men, four and four.

THE COURT: What does that mean, four and four?

THE WITNESS: Well, it is like half a court.

THE COURT: There are four men on each team?

THE WITNESS: Four men on each team.

Q And they play half a court? Do they play half a court or full court?

A Half a court.

THE COURT: How many men can you have playing basketball at one time there, fortyeight or is it more?

THE WITNESS: Forty-eight.

Q Does everybody that goes to the gym play basketball?

A No, some lift weights, some watch, you know.

Q At any given gym session, how many people are sitting up in the bleachers?

A You may have about -- say, about ten guys waiting to get on the big court where they have the very good players and they want to participate in tough competition, so, you know, there are so many good ballplayers over there, they wait for the good court.

Q Just to clarify it for the record, the team that wins continues to play, is that right?

A That's right.

THE COURT: Officer, would you remind me again --

I know the arden testified about it -- but what hours of the day is the gym available?

THE WITNESS: Two-thirty.

THE COURT: To when?

THE WITNESS: To eighty-thirty.

Q In that 2:30 to 8:30 period, how many gym sessions do you run?

A We run four. Three for the population, you know.

THE COURT: And what is the other one for?

THE WITNESS: The other one is for --

THE COURT: Staff?

THE WITNESS: No, the workers in the mess hall, you know, that work all day.

THE COURT: They are separate from the prisoners? Who are they? Are they prisoners? Are they detainees?

THE WITNESS: They are trial prisoners that are on trial, but they work in the mess hall, you know, they have jobs there.

Q Aren't there sentenced prisoners in the mess hall also?

A Yes. They have a period -- they have another period.

Q I see. It all still comes out to only one period per week for each man for the gym, is that correct?

A Yes, for trial inmates.

Q The trial inmates.

THE COURT: What about Saturday and Sunday? Is the gym open on Saturday and Sunday?

THE WITNESS: No, it is not.

THE COURT: How many people would you need --

THE WITNESS: Unless we have an outside ball game Saturday morning.

THE COURT: Who do you have outside ball games with?

THE WITNESS: Well, different organizations, Colony House, Elm Corps.

THE COURT: How many people participate in those outside ball games?

THE WITNESS: Well, the fellows we have on the team and whoever we bring down there to watch the games.

THE COURT: What would be the maximum?

THE WITNESS: Well, we generally do it, you know, from -- we were doing it block-to-block, you know, a block goes at a time and the other block goes at another time.

THE COURT: As spectators?

THE WITNESS: As spectators.

Q Is it your testimony, then, that it takes six

hours to run these four gym sessions?

A Yes.

THE COURT: How many people do you have, staff members like yourself or others on the floor of the gym when it is being used regularly?

THE WITNESS: Myself and another man, another officer.

Q Are you also responsible for escorting inmates down to the gym?

A Yes, that is my main function.

THE COURT: Occupation?

THE WITNESS: Yes. I'm a junior man.

THE COURT: Then you escort them to the gym and you watch to see that nothing goes wrong while they are playing and then you escort them back?

THE WITNESS: That's true.

Q In the yard, you have four baskets per yard?

A That's right.

Q And do you play -- are there four games going on each of those baskets?

A That's true except when the yard is not too full and they play full court on one of the baskets.

Q Do they also play volleyball in every yard session?

A Yes.

Q About how many men would be engaged in volleyball at any given time?

A It depends. Sometimes they have five on a team and sometimes they have three on a team.

Q Do you know a deputy, assistant deputy warden, named Caldwood?

A Yes.

Q Is he your superior?

A Yes, he is.

Q Is he connected with the operation of the recreation system?

A Yes, he is.

Q I would like to read you a statement he made and ask you whether you agree with it or not.

MR. TOBIAS: Objection.

THE COURT: Overruled. It is just a way of asking what the witness' opinion is.

Why don't you do that? Ask him whether he agrees with the following statement.

Q Do you agree with the following statement:

"Now, one thing I would like to qualify when I give you the yard schedule. When we call recreation, if it takes an inmate an hour to get out, that is their

recreation time. If they move quickly, then they wind up with an hour and ten minutes or some wind up with 45 minutes."

Is that an accurate statement?

THE COURT: We are talking about outside recreation, is that right?

MR. BERGER: Yes, with regard to the yard.

THE COURT: With regard to yard recreation, is it correct if a man gets out there quickly he will have more time to spend there than if he doesn't?

THE WITNESS: That's true.

Q If he is out there more slowly, it could be the equivalent of 45 minutes?

A Yes.

THE COURT: I am confused by this line of questions. It is up to the man. All he has to do is walk out the door?

THE WITNESS: That's true.

THE COURT: He is not escorted to the yard, is he?

THE WITNESS: No, yard is called and they go out.

THE COURT: Not everybody can go through the door at the same time.

THE WITNESS: But it doesn't take any time to get

them out.

Q Do you agree with Deputy Caldwood's assertion that the yard session could run as little as 45 minutes?

MR. NUSSBAUM: That is a confusing question. I object. He has rephrased his own question.

THE COURT: He has that right.

Mr. Berger, just ask that question.

Q Do you agree some wind up with 45 minutes?

THE COURT: Mr. Berger, I understand it this way -- and correct me if I am wrong, Officer -- the yard is here, the block is here and the door is here.

You walk through the mess hall or day room, is that right?

THE WITNESS: That's correct.

THE COURT: Out to the yard. When you call yard, what is there that would hold a man up who wants to go out from going out?

THE WITNESS: Nothing.

THE COURT: If he wants to come out a half-hour after the yard starts, can he do that?

THE WITNESS: Yes, he can.

THE COURT: Do some people do that?

THE WITNESS: Yes, they do.

In other words, he may be involved in a chess

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game or card game.

THE COURT: Or he may be bored to death, but in any event, it is up to him when to come out, is that right?

THE WITNESS: That's true.

Q By the way, how much time does it take to get the men down to the gym from their blocks?

A Oh, I would say about 8 minutes, 7 minutes, you know. By the time you count them out, you get a total count and you walk them down.

THE COURT: Does that come out of the hour or do they have a full hour in the gym?

THE WITNESS: No, they have a full hour. Their hour starts from the time they enter the gym. That is when the whistle is blown for them to get out.

THE COURT: And that is why you can get four sessions in the six hours, I guess?

THE WITNESS: That's right.

MR. BERGER: No further questions.

THE COURT: Thank you very much, Officer.

(Witness excused.)

MR. TOBIAS: Your Honor, at this time we do not plan to put in any more witnesses. I am reluctant to say we rest, since the plaintiffs may put in things.

THE COURT: Then you will have rebuttal.

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MR. TOBIAS: We would like to re-open our case.

THE COURT: You always have the right to rebut; but I regard you as having rested your case in chief.

MR. HERMAN: Your Honor, I call Mr. Benjamin.

J A M E S E R N E S T B E N J A M I N, called as a witness by the Plaintiffs, being first duly affirmed, testified as follows:

DIRECT EXAMINATION

BY MR. HERMAN:

Q Mr. Benjamin, are you currently awaiting trial on a criminal case in New York?

A Yes, sir, I am.

Q Have you ever been convicted of a crime?

A Yes, I have.

Q When?

A Several times -- well, a number of times in the last ten years.

Q What charges have you been convicted of?

A Oh, I have been convicted of burglary, I have been convicted of confidence games, I have been convicted receiving stolen property.

Q Are you presently being detained in the New York City House of Detention for M n at Riker's Island?

A Yes, I am.

Q How long have you been there?

A Pardon me?

Q How long have you been at the New York City House of Detention for Men?

A About fourteen and a half months.

Q Have you ever gone to the gym?

A Yes, I have.

Q Would you tell the Court what you do when you go to the gym?

A Well, the few times that I have gone to the gym, I attempted to lift weights, I tried to play basketball and I also sat in the bleachers and just talked, spectated.

Q You say you attempted to lift weights. Were you able to do it?

A Well, the weight-lifting areas are confined to several mats and with more than a few men lifting weights, it presents -- in my opinion, it presents a health hazard, bar bells fall and whatever.

Q Have you ever witnessed any accidents?

A Yes, I witnessed a fellow turn over with weights in his hands while landing on an incline board that was wobbly.

Q Mr. Benjamin, is it your testimony there is not

enough room in the weight-lifting area?

A No, not for me.

Q You also say you attempted to play basketball. Are you able to play?

A Well, I'm not a superb basketball player.

THE COURT: Are you a normal basketball player?

THE WITNESS: Well, you know, when I was younger.

THE COURT: You are just as capable of playing basketball as --

THE WITNESS: Yes, dribbling and shooting around. Four-man sides with half games and long lines is the only recreation, you know -- a week's time isn't really enough --

THE COURT; We are not on the question of whether it is enough.

Was there anything to prevent you from playing?

Q Were you able to play basketball everytime you wanted to play? Are there enough courts?

A No, there are only six courts and there usually is a long line of winners, you know, people who want to play, who are waiting on sides and who want to play.

Someone like myself who isn't a superb basketball player, in most cases, I was unfortunate enough to get chosen on the losing side. This means I play one game and that is it. I have to go back to the yard.

Q Mr. Benjamin, why do you go to the gym if you don't participate that often?

A Well, I don't go that often.

Q What is the reason that you don't go?

A Because I feel it is a waste of time. I won't have anything to do when I get there.

Q Mr. Benjamin, have you ever worked on a house gang at Riker's Island?

A Yes, I have.

Q Are you presently on a house gang?

A Yes, I am.

Q Will you tell the Court what your duties are?

A Well, I have been assigned or I am responsible for cleaning a particular tier.

THE COURT: Is this an assigned job?

THE WITNESS: Yes.

Q Do you get paid for it?

A Yes.

Q How often do you perform your duties?

A Every day.

Q How many times a day?

A Usually once, sometimes twice.

Q During what hours do you clean the tier?

A The usual hours are from -- well, I am usually

finished by eight o'clock and I may start at -- well, sometime between a quarter to six and eight o'clock, I do what I am supposed to do.

Q Is that in the morning or the evening?

A In the morning.

Q How long does it take the gang to finish cleaning the tier?

A Well, the gang usually finishes about eight, sometimes, eight-thirty, and the work is started, like I say, about a quarter to six -- about six o'clock, a quarter to six. On the A side, it is started as soon as the A Side locks in.

THE COURT: What side are you on?

THE WITNESS: I am on the B Side.

THE COURT: On the A Side, when do they lock in, do you know?

THE WITNESS: It depends. Some mornings the A Side is locked in by six-thirty. Some mornings a little -- around six-thirty.

THE COURT: So does that mean they get through a little later?

THE WITNESS: No, it doesn't. Sometimes, like myself, I clean the tier on the A Side. Sometimes I may start before the A Side locks out for breakfast.

THE COURT: Oh, you mean that you may clean on either side?

THE WITNESS: No, I am responsible for the tier on the A Side.

THE COURT: Even though you live on the B Side?

THE WITNESS: Well, the five block, the entire house gang block is on the B Side.

THE COURT: In any event, am I correct in understanding that the cleaning of both sides ends about the same time?

THE WITNESS: Well, the cleaning of the block ends about eight o'clock.

THE COURT: Is that both sides of the block?

THE WITNESS: Yes, the entire block.

Q Are both sides cleaned at the same time, simultaneously? Are there people working on both sides at the same time together? Or do you do one side and then the other side?

A Well, let me -- may I explain it my way?

Q Yes.

THE COURT: Please do.

A Well, there are about twelve, fourteen men on the house gang.

THE COURT: For each block?

THE WITNESS: Five block.

THE COURT: For your block?

THE WITNESS: Yes. And each one of the twelve, fourteen men is assigned or responsible to clean a certain tier or to flush the shower room or whatever.

Each man starts his work whenever he can get a broom or mop or whatever he needs to do his work. He starts whenever he gets his equipment and finishes about five or ten minutes later.

THE COURT: Whichever side he is on, he does that, too, you don't all work one side and then go to the other side?

THE WITNESS: No.

Q Mr. Benjamin, does each man have his own equipment?

A No, we share brooms and mops. There are about -- well, there are a few mops and there are a few brooms.

Q When you say a few, how many are there?

A Well, I think right now there are two or three push brooms and about five mops -- four or five mops.

Q So the whole house bang can't work at the same time?

A No.

THE COURT: How long does it take for you to do

your part of the job?

THE WITNESS: About five minutes.

THE COURT: What do you do?

THE WITNESS: I sweep and mop the tier.

THE COURT: A whole tier?

THE WITNESS: Yes.

THE COURT: You do that in five minutes?

THE WITNESS: Yes, push brooms, walk from one end --

THE COURT: I can see the broom part wouldn't take so long.

THE WITNESS: A tier is only several feet wide and the mopping creates no big problem.

THE COURT: Probably not.

Q You don't mop throughout the whole block?

A No, just one tier.

Q Which tier?

A 5-A Tier.

Q 5-A Tier is the only part?

A Yes.

THE COURT: Isn't the area up on the second level?

THE WITNESS: Yes.

THE COURT: Are you talking about one end of it

to the other?

THE WITNESS: No, just half of that.

THE COURT: Even so --

THE WITNESS: There are twelve tiers in a block.

THE COURT: Twelve tiers?

THE WITNESS: Yes.

Q How did you get on the house gang, Mr. Benjamin?

A Well, I asked the officer for a job because I had nothing to do all day and he assigned me on the house gang.

Q Is the procedure you ask the guard?

A Yes.

Q To the best of your knowledge, are there other men currently waiting to get on the house gang?

A Oh, yes, there are quite a few people.

Q There are?

A Yes.

Q Mr. Benjamin, do you ever take advantage of the evening and weekend optional lock-in program that the institution has?

A Very often.

Q Why do you do that?

A Well, because locking in the cell affords me an opportunity to lay down and read, which I am not able to do if I am locked out. There aren't very many benches or

seats. Well, there aren't very many -- well, there really isn't any place to get comfortable and read or write.

Q If there were optional lock-outs during the daytime hours, would you take advantage of that?

A Yes.

Q Is it for the same reason you take advantage of the evening lock-outs?

A Yes.

Q Mr. Benjamin, could the sanitation -- tier sanitation be done faster if there were more men working on the house gang?

A Yes, it could be done faster and better, too.

Q And could it be done faster if there was more equipment on the -- available for the house gang?

A Yes.

CROSS-EXAMINATION

BY MR. TOBIAS:

Q Mr. Benjamin, on what charges are you waiting trial?

A I am waiting trial on a 1971 indictment charging me with possession of a weapon and possession of narcotics with intent to sell, and I am also awaiting a charge on a 1973 indictment for homicide.

Q Now, Mr. Benjamin, you stated that you wouldn't

use the weight-lifting facilities in the gymnasium.

Was it because there was no room for you to participate?

A I don't understand what you are saying.

Q I take it you felt there was some sort of safety hazard involved in using this apparatus, is that not correct?

A Oh, yes, definitely.

Q If you wanted to take such risks that you felt existed, could you use the facilities?

A Yes.

Q There was room for you to use the facilities, then?

A Part of the safety hazard is due to the fact there is very little room.

Q But you could have used it if you wanted?

MR. HERMAN: Your Honor, he answered the question.

THE COURT: He did. Mr. Tobias is entitled to clarify it, but I understand the witness' position to be he could have weight-lifted there but he felt the amount of space available --

THE WITNESS: No officer told me I couldn't do it.

THE COURT: It wasn't so crowded you couldn't

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get in there. You just said it was crowded and you felt it wasn't safe?

THE WITNESS: Well, I'm not -- when you say crowded and you say it like this, I mean --

THE COURT: I was making an extreme example. I mean people weren't standing back-to-back there, of course, and you didn't say they were.

THE WITNESS: No, but merely touching elbows and thatis dangerous to lift weights.

THE COURT: But when you first got there, I suppose it wasn't that crowded?

THE WITNESS: No, I guess not.

THE COURT: Anyway, it was full the times you wanted to be there or nearly full?

THE WITNESS: Yes.

Q Did you ever consider asking him if he would allow you to use the equipment after he got through with them?

A Asking who?

Q The person who was using it ahead of you. Did you ever consider asking him if he would use the facilities for half a period and then let you use it for the remainder of the period?

A I don't understand what you are saying. Should

I have asked him to move out of the way?

Q Did you ever consider asking him to let you use the facilities?

A To move out of the way?

Q To leave the area in a half-hour and let you share the facilities with him.

A There is nothing to prevent me from sharing the facilities with any man there. At least I haven't met any man using the gym who would prevent me from using the facilities with him, but, as far as me asking him to leave the area after half an hour, I think that would be a little selfish and unreasonable on my part.

THE COURT: So you didn't do it?

THE WITNESS: No, I didn't.

Q Mr. Benjamin, I would like to clarify the number of people that use the basketball facilities while you are in the gymnasium.

Could you give us an estimate of the number of people who want to play basketball while you are up there?

A Well, everyone who goes to the gym -- most everyone who goes to the gym wants to play basketball.

Q You are not answering my question.

A I wasn't counting.

Q Could you give me a numerical figure?

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THE COURT: I don't think he purports to do that.

A No, I don't make no counts.

Q You did say there were a certain number of people waiting to use the basketball facilities, waiting on line to get winners, so to speak?

A Yes.

Q Was this true of every basketball or just the courts where the better ballplayers were playing?

A No, every court.

Q Does it vary to any degree, from court-to-court, the number of people using the facilities? Any variation in the number of people waiting to use the facilities?

A Well, the players vary according to, you know, the quality of their game, but as far as the numerical difference from court-to-court, I haven't noticed any, no. Just about all courts have a line of winners.

Q How many people -- let's say there are eight people playing on a court.

A Yes.

Q I take it there are four men on each side?

A Yes.

Q How many people are waiting for their --

MR. HERMAN: Objection. The witness said he hasn't counted.

MR. TOBIAS: He hasn't counted the total number of people. He has given an indication of the number of people waiting to use the particular basketball facilities. I am trying to get a little more definite here.

THE COURT: There is already before me the question -- and I don't know the answer to it, I am not saying I do at the moment -- whether, let us assume that I find that everybody at Riker's Island, House of Detention for Men, can get one hour of exercise per week if he wants to, the question is whether that is adequate.

The question of whether one hour per week or three quarters of an hour per week or 35 minutes per week doesn't seem to me to be relevant.

MR. TOBIAS: Your Honor, this man was placed on the witness stand in an effort to narrow down the time within the hour. I think I am entitled to inquire into that.

THE COURT: Go ahead.

Q Mr. Benjamin, I would like some idea of the number of people that wait under each basket to play.

A In any particular basketball game, there are usually several individuals who are called winners.

Q What is several?

A Two, three, four.

Q Okay, thank you.

THE COURT: Is that what you are saying is the number of people waiting to play usually?

A Not the people waiting to play, but the number of games.

THE COURT: Let's simplify the thing.

I thought you said at most basketball courts, there are people waiting to play.

About how many people would you say are usually hanging around waiting to play?

THE WITNESS: Well --

THE COURT: I know you didn't count them.

THE WITNESS: No, but you see -- may I answer it my way, please?

THE COURT: Sure.

THE WITNESS: Sometimes, for instance, I may go to the basketball court and I may call winners and I may not have my whole team with me. There may be someone on my team who may be lifting weights.

THE COURT: There are some people waiting there in order to organize the game?

THE WITNESS: Yes.

THE COURT: But are there other people waiting because you can't have more than four people, or eight

people, on the half-court at one time, waiting to get there and participate in the game in one way or another? Are there other people standing around because there are just too many people?

THE WITNESS: Well, there is always someone sitting in the bleachers.

THE COURT: Waiting to play?

THE WITNESS: Either just talking or waiting for winners, or whatever the case may be.

THE COURT: You don't know how many people are waiting to play right then and there that are prevented from playing because there are just too many people?

THE WITNESS: No, I couldn't say that. But I said in the bleachers were as many as ten or fifteen people that crowd and just talked.

Q Mr. Benjamin, I take it you are a tier man for your particular housing area, am I correct on that?

A Correct.

Q What block are you presently incarcerated in?

A 5 Block.

Q How many tier men are assigned to the 5 Block?

A About twelve or fourteen.

Q Per side or for the whole block?

A For the entire block.

Q So that is seven men on each side of the block?

THE COURT: Are they called tier men or gang?

THE WITNESS: Well, the collective group is called the house gang.

THE COURT: I thought you said there were twelve or fourteen in the whole house gang?

THE WITNESS: Yes.

THE COURT: Don't they do something besides tiers?

THE WITNESS: No, just the tiers and shower room.

THE COURT: How about the flats?

THE WITNESS: That is a tier, too.

THE COURT: I thought that was different.

Q Mr. Benjamin, I take it the tier men don't clean the individual cells, do they?

A No, sir.

Q Who does that?

A The occupants of that cell.

Q I see. Is there a particular portion of the day that is reserved for that activity?

A No. An individual cleans his cell whenever he wants to.

Q Are any materials given to the inmates to assist them in cleaning their own cells?

A No. In fact, the material is taken away on frisk.

Q They are not given brushes or things of that nature to assist them, rags, dry mops, to assist in cleaning their own cells?

A No. If a man wants that, he gets it himself.

THE COURT: I can't hear you. What?

THE WITNESS: If a man wants those things, he has to get them himself.

THE COURT: I don't think Mr. Tobias means would make him a formal gift. I think he meas, are they made available to him if he wants them?

THE WITNESS: I don't know where he is going to get them from.

THE COURT: How do you clean your cells?

THE WITNESS: How do I clean my cell?

THE COURT: Yes.

THE WITNESS: Well, if there are any brooms -- well, if there are any brushes available, I will get one.

THE COURT: How do you get it?

THE WITNESS: Well, I wait until supplies come in.

THE COURT: Where do they leave them? That is what Mr. Tobias is trying to bring out.

Q Mr. Benjamin, when does this happen?

A Supplies come in?

Q When the people take the supplies, brushes, or whatever to clean their cells.

THE COURT: Any special time of day?

THE WITNESS: No, no special time. Anytime of the day a man feels like he wants to clean his cell, if he can get the equipment, he cleans it.

Q Is the equipment available throughout the day?

A No. May I answer the question in my own way and maybe clarify something for you?

Q Surely.

A Well, about once every month or so periodically supplies go to the block. We receive toilet brushes, brooms, mops, things of that nature. These supplies come to the block and as soon as there is a block shakedown or a block frisk, these supplies are taken away.

Oftentimes, broom handles or sticks are broken or whatever the case may be, so a man would more or less have to grab a broom whenever he can. If he doesn't grab it, he doesn't get it.

Q So it is your testimony there is not a certain time of the day for distribution for the inmates to clean their cells. Is that what you are saying?

A Yes.

Q I believe you stated on direct examination that the tier sanitation ends at 8:00 a.m. or thereabouts.

A Yes.

Q Are you stating that there is no more tier sanitation, for instance, until after lunch?

A Some days -- well, if necessary, I have cleaned my tier, the tier I am assigned to in the afternoon.

Q So you are changing your testimony now?

A No. I am not changing it. I believe I said originally that I cleaned the 5-A tier sometimes twice, but usually once a day.

Q Are you saying that after -- generally after eight o'clock or thereabouts the tier is not swept down any more? Is that what you are saying?

A Yes.

Q You told us once a day, 8:00 a.m. or thereabouts and then no more after that.

A No, the only exception to that is maybe those men assigned to the flats. They very often do sweep the flats down after nine-thirty at night and they very often do sweep the flats down between 3:00 p.m. and 4:00 p.m.

Q You stated those people assigned to the flats. Does this group of inmates differ from the tier men? Is this a different group of inmates?

A No, they are in the house gang also.

Q They are part of this team?

A Yes.

THE COURT: Am I right the word "flats" is another name for the floor outside the cell?

THE WITNESS: Well, the word "flats" is that very wide tier on the ground floor.

THE COURT: What you would call floors mostly as distinguished from a tier?

THE WITNESS: Yes.

Q So there is tier sanitation done by somebody, if not yourself, throughout other parts of the day?

A Yes.

Q Do any individuals other than people on the tier gangs perform tier sanitation on the tier, non-paid people?

A Sometimes a man who wants the job on a house gang, he may work voluntarily, you know, until an opening is created, someone goes home or whatever. He may work voluntarily until he gets assigned officially.

Q Is this type of voluntary cleaning activity encouraged by the correction officers?

A No.

Q Do they come around and ask for volunteers to help clean up the area?

A No.

Q It is not?

A No.

Q Now, Mr. Benjamin, I believe you stated that at a particular time you had nothing to do all day.

How often do you receive personal visits?

A How often?

Q Yes.

A Well, I don't -- I don't know how to -- well, in the fourteen months I have been on Riker's Island, I received about nearly a hundred personal visits, not counting those from my attorney.

However, in the last few months, I haven't received any personal visits because we moved -- well, my wife has moved to Pennsylvania and it took her a large portion of the day to visit Riker's Island from Manhattan. So visiting from Pennsylvania is a little difficult.

Q So you receive about 100 personal visits. How often does your attorney visit you?

THE COURT: I don't see what this has to do with the issues.

MR. TOBIAS: Peripherally. I will move on to something else.

Q Mr. Benjamin, have you moved out to the yards

since you have been incarcerated at the House of Detention?

A Yes, I have.

Q Now, in the yard periods, were you able to play basketball and volleyball?

A Well, in the outside yard, I prefer to job, jog around the yard. I prefer running.

Q Did you do this every yard period?

A No.

Q Whenever you felt like it?

A Yes.

Q Mr. Benjamin, have you ever done any calisthenics on the housing tier? Do you know what calisthenics are?

A Yes.

Q Have you ever done any on the housing tier?

A Yes, I have done push-ups, sit-ups.

Q How often have you done this?

MR.HERMAN: Objection, your Honor. This whole line of questioning was gone into previously and we determined this kind of exercise was not a substitute.

THE COURT: I don't care if he did it all day every day. I don't consider the City to fulfill its obligations to provide an exercise program for the inmates by push-ups and sit-ups.

I did make a decision. You can follow it through. I am very interested in hearing about the gym program.

MR. TOBIAS: Your Honor, I think it is germane, in that there is a certain distinction between the physical space available at this facility as opposed to the Tombs. I think your Honor's point was well taken at the other institution.

THE COURT: There wasn't any significant difference between it and the Tombs as far as making push-ups and sit-ups an appropriate form of discharge of the City's obligation to provide an exercise program.

MR. TOBIAS: Your Honor, I do think, though, when we did take you, there was quite obviously a large expanse of area that was vacant.

I would just like to find out what types of activities do go on through the day.

THE COURT: That is a different thing. Find out what kind of activities.

Q Mr. Benjamin, do the inmates at HDM do any exercise while either in the day room or on the housing tier?

A Yes.

Q This is something you see going on every day?

A Well, that is something I have seen, yes.

THE COURT: What kind of exercises, Mr. Benjamin?

THE WITNESS: Well, I have seen men do push-ups, sit-ups. I have seen the men practice cotters.

THE COURT: What is that, cotters?

THE WITNESS: A cotter, yes -- well --

Q A form of judo, is it not?

A Yes.

THE COURT: I hear some play handball against the wall, is that right?

THE WITNESS: In the east side day room.

MR. TOBIAS: No further questions.

REDIRECT EXAMINATION

BY MR. HERMAN:

Q Mr. Benjamin, you mentioned when you went into the outside yard, you liked to jog.

A Yes.

Q When was the last time you jogged?

A I believe it was in August?

Q Why don't you jog in the gym?

A Well, there isn't room to jog in the gym without bumping into people.

THE COURT: You asked him why he doesn't jog in the gym?

MR. HERMAN: Yes.

THE COURT: I would like to know why you didn't jog in September and October when they say the yard was open?

THE WITNESS: I don't recall the yard being open.

THE COURT: In other words, you jogged as long as the yard was open? .

THE WITNESS: Yes.

Q Mr. Benjamin, if the yards were open during the winter, would you go out?

A Yes. If it wasn't raining too hard or snowing too hard.

THE COURT: If the weather was decent, right?

THE WITNESS: Yes.

MR. HERMAN: I have nothing further.

THE COURT: Thank you, Mr. Benjamin.

(Witness excused.)

MR. HERMAN: Mr. Rufus Hawk, your Honor.

R U F U S H A W K, called as a witness by the Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HERMAN:

Q Mr. Hawk, how old are you?

A Forty.

Q Are you presently being detained in the Riker's Island House of Detention, New York City House of Detention for Men?

A That's correct.

Q Have you ever been convicted in the past of a crime?

A Yes.

Q You have?

A I have.

Q What crimes?

A Possession of a narcotic drug. Also robbery.

Q Mr. Hawk, do you ever take advantage of the optional lock-out program that the institution has on evenings and weekends?

A I do.

Q Do you do it often?

A Yes.

Q Why?

A Mainly I have a little privacy when I want to go in my cell and lay down or read. That is the reason why I go in.

THE COURT: Do you do much reading?

THE WITNESS: Yes.

THE COURT: How many books? It is just a matter of interest to me. Would you say you read a book a week or how much do you read?

A I read more than a book a week.

Q Mr. Hawk, how do you feel about having to lock-out during the daytime hours when you don't have the option?

A There is a lot of times when you don't feel like coming out yourself when it is compulsory to come out. You might be tired or sleepy, you don't feel so good --

MR. TOBIAS: I object. I don't think it is relevant.

MR. HERMAN: Your Honor, we are getting to the sufficiency of the lock-out program.

THE COURT: I don't think it depends on feelings because I have held, and we are all agreed, that at least one proposition is true as a matter of law that a detainee should ot be held under more restrictive conditions than are necessary, so I think the question is whether it is necessary, not whether he enjoyed it.

Q Mr. Hawk, are you on medication?

A Yes.

Q What are you on medication for?

A I suffer from a nerve condition.

Q You are taking medication?

A Yes.

Q Who is the medication given to you by?

A The medication is given to me by the nurse that comes on the block.

Q Mr. Hawk, does this medication have any effect on you?

A Yes, it affects my speech and I am groggy at times.

Q Groggy at times?

A Right.

THE COURT: When you are locked out, how do you spend your time generally, Mr. Hawk?

THE WITNESS: Mainly I spend my time playing cards.

THE COURT: Where do you sit?

THE WITNESS: I try to get in to the day room.

THE COURT: Is it possible to read in the day room?

THE WITNESS: Well, it all depends. Sometimes the guys would be singing in there, there is a lot of noise in there at the time.

THE COURT: What kind of game do you play?

THE WITNESS: Bridge.

THE COURT: Are you pretty good?

THE WITNESS: Yes.

Q Mr. Hawk, did you ever tell the doctor about the effects of the medicine?

A Yes.

Q And what did he instruct you to do?

A Well, he told me when --

MR. TOBIAS: Objection, your Honor. This is hearsay.

THE COURT: It isn't hearsay. He heard the man tell him.

Q Continue.

A He told me if I felt groggy to let the officer know, that he would let me in my cell to lay down. I had informed the wing officer about this several times.

THE COURT: Which officer?

THE WITNESS: In charge of the A Side.

THE COURT: Right, and what happened?

THE WITNESS: He refused to let me in my cell.

Q So you have had to lock out all the time?

A That's right.

Q Mr. Hawk, how long have you been in the New York City House of Detention for Men?

A About seven weeks.

Q How many times have you gone to the gym?

A Well, they had gym twice and I went once.

Q You did go once?

A Yes.

THE COURT: When you say you had gym, they told your block you could go to the gym?

THE WITNESS: Right.

Q They called your block twice in seven weeks?

A That's right.

MR. HERMAN: I have no further questions -- just one more.

Q What block are you in?

A 3.

Q 3 Block?

A Yes.

MR. HERMAN: I have no further questions.

CROSS-EXAMINATION

BY MR. TOBIAS:

Q Mr. Hawk, can you please tell us exactly what crimes you have been convicted of?

A Possession of a narcotic drug, robbery and sales of narcotics.

Q These are the only three crimes?

A I have been arrested for misdemeanors.

Q What are those?

A Under the influence of narcotic drugs, petty larceny, possession of stolen goods.

Q Anything else?

A Failing to change my address as a registered narcotic user.

Q Anything else? Is that the complete record?

A No, that is not the complete record.

Q Please give us the complete record.

A Well, to give you a complete record, let's see -- basically charges of misdemeanors I have been arrested of. I have been arrested several times under the influence of narcotic drugs; failing to notify of change of residence.

Q I am only speaking of convictions.

A That is what I am speaking about.

Q Anything you didn't mention that you have been convicted of?

A I mentioned everything.

Q Mr. Hawk, what charges are you presently awaiting trial for?

A Robbery.

Q First degree robbery or second degree robbery?

A I don't know. I haven't yet decided. I have to see my attorney.

Q Mr. Hawk, I notice you stated on direct examination that you went to gym -- that your tier was called to the gym only twice since you have been there.

How long have you been incarcerated again?

A I would say approximately seven weeks.

Q Two times in seven weeks. How many visits have you had during this time?

MR. HERMAN: Objection, your Honor. We haven't had any testimony on that.

THE COURT: Sustained.

MR. TOBIAS: I am trying to elicit this information, your Honor, in order to show that possibly Mr. Hawk was away from the tier when recreation was called.

THE COURT: Oh, all right.

Q Are you stating, Mr. Hawk -- maybe I will simply things -- are you stating thatnobody on your tier was called for gymnasium during the other weeks that you didn't go to the gymnasium, these other five weeks?

A What I am stating, during the time of the gym period, I was in the wing and only twice --

Q Oh, but other people from your tier did go up to the gymnasium?

A I told you they only called gym twice.

THE COURT: You only heard them call it twice?

THE WITNESS: I am speaking of my knowledge.

THE COURT: What we are trying to find out is have you been out of your cell at all during the times they might have called gym?

THE WITNESS: You are supposed to be in your cell.

Q I mean one of the other areas, medical room, visitation block or the counsel room or a hundred other places.

A Not at the time when gym is called.

Q When is gym called?

A In the afternoon.

Q What time?

A It varies.

THE COURT: That is just the point. Were they all afternoon every afternoon?

THE WITNESS: When I say it varies, I am talking about the time.

THE COURT: I know that.

THE WITNESS: It might be two-thirty. It might be, the other night for the gym they had gym at seven-thirty.

THE COURT: Are you telling me every afternoon you have been in the block from two-thirty to seven-thirty?

THE WITNESS: Not every day.

THE COURT: That is what we are trying to find out.

THE WITNESS: I had a quarter period.

THE COURT: What about visits?

THE WITNESS: I have had no visits since I have been there.

Q So you don't know if there is a specific time period reserved for your side to receive its gymnasium period, you don't know whether there is a specific time, or if there is, you don't know what that specific time is?

A What I am saying is I have been in that block on the days that we are supposed to go to gym, which is a Friday, and I haven't been to gym but once out of the two times that they called.

THE COURT: All right. Are you telling us that your block, Block 3, is it --

THE WITNESS: Block 3.

THE COURT: When it is called for gym, it is called on Friday?

THE WITNESS: Right.

THE COURT: Is that right, Mr. De Pass?

OFFICER DE PASS: Friday and Monday.

THE COURT: What about Monday, Mr. Hawk? Do you remember any Monday calls?

THE WITNESS: I am trying to think of my court appearance dates. I was in block on Monday.

OFFICER DE PASS: One side broke Monday and the other side broke Friday.

Q Which side are you on?

A I am on the B Side.

MR. TOBIAS: The B Side, when did that go?

OFFICER DE PASS: I believe Friday.

Q You have been on the tier area from Tuesday to seven-thirty every Friday since you have been incarcerated, is that your testimony?

A Yes.

Q Mr. Hawk, you stated that you tried to get into the day room on occasion.

Are you saying you couldn't get into the day room during lock-out period?

A I didn't say. I said I tried. The Judge asked me if I used the day room and I said I have used the day room.

Q Does anybody prevent you from going into the day room during the lock-out period?

THE COURT: I don't think there is any question about that. He said it was mostly too noisy for reading.

Q I take it there is some singing in the day room

55-jwesb Hav.. cross

and that disturbs you when you read?

A Right.

Q Is there any singing on the housing blocks?

A Well, if there is any singing, the guys usually go into the day room or into the shower room.

Q Would you characterize the housing blocks themselves as apart from the day room as quiet areas?

A It is a little bit more quiet than out on the flats because you get most of the population out there, you have got the TV out there, it is a little more quiet, plus it is a closed area there, it is in a room. But it gets loud for me.

THE COURT: At least it is the most quiet place there is?

THE WITNESS: Right.

Q Do they play the radio over the loudspeakers during the day?

A Yes.

Q On the housing tiers?

A Yes.

Q When do they turn on the radio?

A I cannot give you the exact time.

Q The morning, evening?

A Morning.

Q Does it stay on?

A They might cut it off.

Q How long is it usually on for?

A I would say the radio would come on about ten o'clock in the morning.

Q And when would it go off?

A It would go off about right after lunchtime.

Q Did it come back on after lunch?

A Sometimes.

Q How long does it remain on for?

A Up until chow.

Q I take it this noise doesn't bother you when you are trying to read?

A Most of the times I might be in my cell. As long as the radio is playing, it is not playing that loud because there is no speaker in front of my cell.

Q How about the television set, is that on during lock-out hours?

A Yes.

Q Do inmates watch the TV continuously during lock-out hours?

A Yes.

MR. TOBIAS: I have no further questions.

MR. HERMAN: I have nothing further.

THE COURT: Thank you very much, Mr. Hawk.

(Witness excused.)

THE COURT: How much longer do you think the testimony will take?

MR. HERMAN: Another half-hour, your Honor.

THE COURT: We will take a ten-minute recess then.

(Recess)

MR. HERMAN: Your Honor, I would like to recall Mr. Benjamin to clarify something.

THE COURT: All right.

J A M E S E R N E S T B E N J A M I N, recalled.

DIRECT EXAMINATION

BY MR. HERMAN:

Q Mr. Benjamin, previously you heard the officer testify that when inmates want to go to the outside yard, once it is called, all they have to do is walk there if they are in the block.

Did you hear him say that?

A Yes.

Q Is that correct?

A No.

Q Speak up, please.

A I was in 4 Block during the summer and the yard

was open on the A Side and whenever the yard was open, the A Side day room was kept empty and whenever the yard was in use, the A Side day room was kept empty and both doors that connect the yard with the block, the door leading away from the day room into the yard and the door that separates the day room from the block, both of those doors are kept locked after the yard is opened.

In other words, the yard is announced in the block and all of the men, all of the inmates, like they assemble in an informal fashion.

THE COURT: On the B Side or which side, on the A Side?

THE WITNESS: On the A Side. And, you know, the doors are open and everyone who wants to go into the yard goes into the yard and then the doors are locked.

Q You can't go from the day room to the yard and back if you want to get in?

A No, no.

THE COURT: Suppose you come down five minutes late and want to go out, can you knock on the door and get out?

THE WINTESS: Well, you can't be heard. The officers -- like there is no one in the day room. The officer with the key is on the yard side, so there is no --

THE COURT: Is the entrance into the day room from the block itself locked?

THE WITNESS: Yes, that is locked also.

Q So you would have to get an officer to get to the yard?

A I think you would have to get two. I'm not sure, I believe it is two.

MR. HERMAN: I have nothing further, your Honor.

CROSS-EXAMINATION

BY MR. TOBIAS:

Q Mr. Benjamin, this practice you testified to, did you see it happen anywhere else or just this particular yard you were involved with?

A 4 Block was the only block I was in during the summer.

Q So you don't know whether this happened anywhere else?

A No.

Q Mr. Benjamin, how long does it take you to get from the cellblock to the yard in point of time, just to refresh my recollection?

A It is only a few steps from the block to the yard.

MR. TOBIAS: All right.

60-jwesb Benjamin-cross

THE COURT: Thank you.

(Witness excused.)

MR. HERMAN: Mr. Murphy.

J A C K M U R P H Y, called as a witness by the Plaintiffs, being first y sworn, testified as follows:

DIRECT EXAMINATION

By MR. HERMAN:

Q How old are you, Mr. Murphy?

A Thirty.

Q Mr. Murphy, are you awaiting trial now at Riker's Island?

A I am awaiting sentence.

Q You have been tried?

A Yes.

Q I take it you have been convicted of a crime?

A Yes.

Q What crime were you convicted of?

A Sale of cocaine.

Q Have you ever been convicted of any other crime?

A No, I haven't.

Q What block are you housed in at Riker's Island?

A 4 Block.

Q Are you on the inmates help?

A Yes, I am.

Q What are your duties?

A Well, I am the 5-B tier man. And it is my duty to see --

THE COURT: I thought you said you are on Block 4?

THE WITNESS: Yes.

THE COURT: But you are tier man on 5-B?

A Yes. The tiers are numbered 1 through 6. I am on the B Side of Block 4.

Q Fifth tier?

A Right.

Q What are your duties on the tier squad?

A Well, to clean the tiers each morning after chow, once in the afternoon after -- it is usually after afternoon chow and check for empty cells. Also empty cells have to be cleaned out. And that is my mine duty.

Q How many men are on the tier gang in 4 Block?

A Well, there is nine on the tier gang, but then they have a mess hall gang.

Q On the tier gang, it is nine?

A Nine. It is either eight or nine.

Q And each man is responsible for sweeping and mopping down the tier?

A Yes, each man has a tier and one man is a clerk and they have a captain.

Q When the sweeping begins after the men are locked in, does each man start to sweep at the same time?

A No, there is not enough equipment.

Q How much equipment do you have?

A On the B Side, there is one push broom and usually the mess hall wants to use it first because it is right after chow and they have more work to do in the mess hall.

Q Once you get a broom, Mr. Murphy, how long does it take you to sweep from one end of your tier to the other end of your tier?

A Approximately five or ten minutes.

Q After you sweep, do you mop?

A When you can get a mop.

Q How many mops are available for you, for the gang?

A There are three mops but two belong to the mess hall. One belongs to the tier, the tier workers.

Q So you don't get two of the mops until the mess hall gang is through with them, is that correct?

A That's correct.

Q Once you get a mop, how long does it take you to

go from one end of the tier you are responsible for to the other end of the tier you are responsible for?

A Approximately five or ten minutes.

Q Now, Mr. Murphy, where do you get the water you soak your mop in?

A The shower room.

Q Are there sinks on each tier?

A Yes, but they are not working.

Q They are inoperative?

A They are inoperative. There is a sink at the end of each tier.

Q So your job would be made much faster if each man was supplied with a broom and a mop and the sinks worked, is that true?

A True.

Excuse me, I wanted to add something. If the mess hall is through, they have a wagon which, you know, they can roll down, but depending on which tier you are working on, the first, second or third --

Q It is a wagon that carries water?

A Yes, and a wringer.

Q But you still have to go down to the flats?

A Yes.

Q Mr. Murphy, when you clean the tier, is it

essential, in your opinion, that the inmates be locked into their cells?

MR. TOBIAS: Objection, your Honor. I don't believe Mr. Murphy is qualified to give an opinion on this question.

THE COURT: I think he is qualified to say whether he could clean the tier even if the men were not locked in their cells. Let's see what he says to that.

A Well, for the flats, the men would need to be locked in, but for the upper tiers, they wouldn't need to be locked in, because during the day there is hardly any men on the upper tiers. Everything going on goes on in the flats.

The only people sitting up in the upper tiers would be looking at television.

Q They wouldn't get in your way?

A No, they could go downstairs and watch TV if the upper tiers were being cleaned.

MR. HERMAN: I have no further questions.

CROSS-EXAMINATION

By MR. TOBIAS:

Q Mr. Murphy, you are presenting awaiting sentence. On what charge now?

A Sales of cocaine.

65-jwesb Murphy-cross

Q Now, Mr. Murphy, you testified that you are on a tier gang of the 4 Block, is that not correct?

A Yes, sir.

Q What time do you begin your tier sanitation activities?

A Right after morning chow.

Q Which is about what time?

A Approximately seven-thirty.

Q Please correct me if I am wrong, but I take it you sweep up the area and you go and you fetch some water and then you mop the area; is that the order that you use to clean this area?

A Well, yes, sweep it -- well, when I go up to the tier, right, I use the push broom, have a smaller broom because some men want to sweep out their cells.

All I do is sweep the dirt from one end to the other and take down the garbage. I don't have to fetch the water, but the mop has to be cleaned out down to either the wagon fifth or to the slop sink outside the chow room.

THE COURT: A pan?

THE WITNESS: Yes.

Q This is after everything is swept?

A Yes.

Q You stated while you are sweeping, the men

locked in sweep the dirt out of their cell and you sweep everything out.

A Some of them. Whoever wants to sweep out the cell.

Q I take it, then, during the morning, you coordinate your efforts with people cleaning their own cell?

A Well, that is the only cleaning they are usually doing.

Q You do try to coordinate your efforts?

A Yes, I try to coordinate.

Q How many inmates besides yourself do the sweeping activity?

THE COURT: You mean on the tiers?

MR. TOBIAS: Yes.

A Well, there is a man assigned to each tier. Six.

Q How long does it take for each of these six people, including yourself, to do this before they start mopping?

A Well, I really couldn't say.

THE COURT: You said five to ten minutes.

Q How often do you do this?

A Every day.

Q How long does it take this sweeping process to

be completed?

THE COURT: He told us.

MR. TOBIAS: I would like to get this clarified.

A For me, five to ten minutes.

Q You do the whole tier or just a section of it?

A Well, see, like 5-B detail, let's say, right?

Q Yes.

A There is also 2-B Tier. Like 5-B Tier is twenty cells. There is forty cells the whole length of the tier, but the tiers are divided in half.

Q Are the men instructed to go to the flats?

A No, but the cells are locked and very few men stay up on the tiers.

Q Are they permitted to stay upon the tiers if they want to?

A Yes, they are not ordered off the tiers.

Q During the optional lock-outs, are they permitted to stay on the tiers or must they go down to the flats?

A You can stay on the tiers anytime you want to.

THE COURT: Whether it is optional or not optional, right?

THE WITNESS: Right.

Q Have you ever been on the gang that cleans the flats area downstairs where the television is located?

A I have helped,you know, like, say, one of the men went to court or something.

Q I see. So you have seen that operation in effect, then?

A Yes.

Q How long does that take to sweep?

A Sweep, about a --

Q I think, Mr. Murphy, you would agree it is a rather long area?

A It is a larger area.

Q How long would it take to sweep?

A About fifteen minutes.

Q After they sweep it, do they mop it?

A Yes, sir.

Q And how long does the mopping take?

A Twenty, twenty-five minutes.

Q I see. How long elapses generally between the time they sweep it and between the time they mop it?

A Well, it again depends. In the morning, like they might get done sweeping it and they might like to lock us in for the count. They might mop it and let part of the house gang out to mop the tiers before the general population.

Q How long does the process take, then, to your observation?

A About twenty, twenty-five minutes. They are just mopping it. Sweeping might have been already completed.

Q But combined, I take it, in excess of a half-hour?

A Yes.

Q How many times a day does it take place?

A Mopping takes place once a day.

Q When?

A In the morning. The sweeping four times a day.

Q Mr. Murphy, what activities in terms of sanitation go on in the day room? Is that the responsibility of the tier men or is that the responsibility of the feeding gang?

A Yes, that is the responsibility of the feeding gang.

MR. TOBIAS: No further questions.

REDIRECT EXAMINATION

BY MR. HERMAN:

Q Mr. Murphy, how many men are charged with cleaning the flats?

A Two men.

Q And I take it they can't start cleaning until the other tier men are done, is that true?

A It depends, you know, whoever gets the broom or the mop.

THE COURT: If there were enough mops and brooms for everybody, could they sweep at the same time as you?

THE WITNESS: Yes.

THE COURT: Do you sweep your dirt down to the flat?

THE WITNESS: No.

THE COURT: Where?

THE WITNESS: To the end of the tier.

THE COURT: Where did you put it?

THE WITNESS: I take it up and put it in the garbage can.

THE COURT: Did you say pan?

THE WITNESS: Yes, in a dust pan or box.

MR. HERMAN: That's all.

(Witness excused.)

MR. HERMAN: Mr. Hayes.

B R U C E M E L V I N H A Y E S, called as a witness by the Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. HERMAN:

Q How old are you, Mr. Hayes?

A Thirty-seven.

Q Mr. Hayes, have you ever been convicted of a

crime?

A Yes.

Q Tell the Court what you have been convicted of?

A Narcotics, sales of narcotics, transporting narcotics, grand larceny and possession of a --

Q Are you currently detained in the New York City House of Detention for Men?

A Yes, I am.

Q Are you awaiting trial on a criminal charge?

A Yes, sir.

Q What are you charged with?

A Homicide.

Q Which side do you live in in the New York City House of Detention for Men?

A 5 Block.

Q Are you on the inmates' liaison committee?

A Yes, I am representative on the A Side.

Q You are the representative of the A Side. Since Christmas, Mr. Hayes, how many times have you gone to the gymnasium?

A Once.

Q Once?

A Yes. That is the only time they called me.

Q What do you do when you go to the gym?

A Well, I generally play basketball and if I am not on the court or doing --

THE COURT: When you are in gym, what do you do?

THE WITNESS: I generally go to the basketball court. If I am not on the court during the whole process of playing, you know, by winning and playing another game, I go to the --

THE COURT: To the weight --

THE WITNESS: Yes, weight room.

Q Now, Mr. Hayes, generally, does everyone who goes to the gym have an opportunity to participate in the activities?

A No.

Q Why not?

A It is crowded and some can't get winners.

Q Excuse me?

A It is overcrowded and some can't get winners because they don't want to pick them.

Q Mr. Hayes, did you ever go to the outside yard?

A Yes.

Q Can you describe the procedure to the Court of how you get taken to the outside yard?

A Well, before they lock you out for the day, like B Side or A Side, they open the cross door.

73-jwesb Hayes-direct

THE COURT: They don't what?

THE WITNESS: They open the cross door from the A Side to the B Side because the yard -- it is on the B Side of the block.

They give you about five minutes and they lock the cross door and they -- everybody lines up in the hall, in a group and they continue through the day room out into the yard. And they lock the doors.

Q Is anybody permitted to stay in the day room?

A No.

Q If you were busy or not able to get in with that first group going out to the yard, can you get out to the yard afterwards?

A Not really.

Q Could you explain that to the Court?

A Well, the only way you might be able to get outside the yard is if you have to go to the bathroom and if it is all right with the officer when he lets the inmate in to go to the bathroom to let him back out, you know, he might let you go out with him.

THE COURT: I thought Mr. Herman was asking about suppose you are busy and everyone wants to go out into the yard?

THE WITNESS: Can't, no.

THE COURT: You are saying if you have to go to the bathroom,he will let you out?

THE WITNESS: Yes, and he will let another man out.

MR. TOBIAS: This may be interesting, but I don't think this is relevant.

THE COURT: The relevance comes from the question whether it is an all or nothing proposition, I suppose.

Q Now, Mr. Hayes, you did get to go outside, is that correct?

A Yes, sir.

Q Was there enough room for everyone to participate? Are there enough activities?

A No.

Q Could you describe to the Court what is available and what is not enough?

A Well, actually in size, there is about one basketball court split in half with four hoops on it, and that is split in half.

But, generally, you know, the sides we operate on, we take the whole court and play a five-man team, so if anybody else wants to try, they have got to try to get winners or just walk the yard.

Q There are a lot of men who want to play that can't?

A That's right.

Q Mr. Hayes, do you always go to the gym or to the yard when it is called?

A Yes.

Q Do you always go?

A Yes.

Q You do?

A Yes.

Q Mr. Hayes, are you familiar with the clean-up procedures in your block?

A Yes, I am.

Q Are you aware of any problems insofar as cleaning is concerned in some of your blocks?

A It is definitely short of equipment and half the equipment they got there is either broken or, you know, messed up.

Q Are there enough brooms for all the sweepers?

A Definitely not.

Q Are there enough mops?

A Definitely not.

Q How are you aware of this?

A I know everything that goes on in the block. All the problems they bring to me and in turn I take them to the warden or deputy warden.

Q Have you requested more equipment for your cleanup men?

A Yes.

Q What has been the response?

A It is short, the budget.

MR. TOBIAS: Objection, your Honor.

THE COURT: On the grounds of hearsay?

MR. TOBIAS: Hearsay.

THE COURT: I do not think it is hearsay. It is the admission of an agent of the defendant, but I would like to know who it was.

Q Who told you?

A The deputy.

Q Which deputy?

A Caldwood.

MR. TOBIAS: He is not an agent of Commissioner Malcolm. He is certainly not empowered --

THE COURT: Let's get the evidence.

MR. TOBIAS: I stated my objection.

THE COURT: I do not know whose agent he is if he is not the Commissioner's agent or the warden's agent.

MR. TOBIAS: There is a question of whether or not he --

THE COURT: That is not the matter. You can bring somebody in. What he said about the persons who presumably are assigned their responsibilities --

A All I --

THE COURT: Are you saying there is no budget problem?

MR. TOBIAS: I am saying as far as I am concerned if there was or was not a budget problem Mr. Caldwood, No. 1, would not know the extent of the budget problem and if there was he wouldn't have the capacity to pass on it.

THE WITNESS: May I speak, sir?

THE COURT: No. I will make this comment: The

extent of the budget problem has not been testified to. I think anybody in any position of responsibility might well in the City of New York these days be governed by budget problems, whether they voice the Mayor's view with regard to that particular expenditure is another matter. Of course, the real question is whether there is a shortage of equipment here and whether, if there is, the Court has authority to do anything about it, not why there is a shortage.

MR. HERMAN: I have no further questions, your Honor.

CROSS EXAMINATION

BY MR. TOBIAS:

Q Mr. Hayes, I understand you use the weight lifting apparatus in the gynmasium?

A Yes, sir.

Q How often?

A Everytime I get a chance.

Q You stated that there was -- your area only had one opportunity since Christmas to go to the gymnasium. When was that?

A Last Friday.

Q Last Friday, the 10th of January. When does your tier go to the gymnasium?

A We alternate. Tuesday and Friday evenings.

Q Tuesday and Friday evenings?

A We alternate. If we go Tuesday they go Friday.

THE COURT: Your side?

THE WITNESS: Yes.

Q Next week your side will go on Friday?

A Right.

Q Were you present during the scheduled hours when your tier allegedly did not go? Were you present?

A I was present, yes.

Q And they simply were not called for gym?

A Last Friday they were called for gum. Last week was the first time they were called.

THE COURT: But not the other times when they usually are called?

THE WITNESS: No, the excuse was they were giving Christmas shows and didn't have enough help or didn't have enough time.

Q Let's explore that. Was there a Christmas show?

A Yes.

Q And you attended the show?

A Yes.

Q Was this about the time your gym was scheduled to be held?

A Well, not on my day's Christmas show.

Q Was this within a day or two of the time you were supposed to go to the gymnasium?

A Yes.

Q You testified that the people do not have enough brooms or mops and things of that nature. How many do they have?

A My side is about one push broom. There is about two push brooms for the whole block.

Q Block or sides?

A For the whole block.

Q How about mops?

A About three mops.

Q For the whole block or side?

A And hand brooms -- I think there is about one and a half hand brooms for the whole block.

Q In other words, each side has a couple of mops and one or two hand brooms and a push broom?

A Yes.

Q You say this isn't enough?

A No.

Q How long did it take to accomplish the sanitation?

A Well, if they worked organized with enough equipment it wouldn't take too long.

Q How long does it take now?

A It is done in shifts.

Q How long does it take?

A Like I tell you, it is an all-day long job.

Q I see. What about your post-meal sanitation period, how long does that take?

A When they get through?

Q How about breakfast?

A Breakfast, I think I stated earlier that part of it was done before count time and the rest is done after count time.

Q How long does it take?

A About 15 minutes, 20 minutes.

Q Do you get the job done?

A Yes.

Q Is the place pretty well cleaned after this?

A It is done -- the moment it is done, yes, but --

Q I understand people come by later and mess it up again. But it is done well at least the moment you get finished with it?

A Yes.

Q I see, okay. In the gymnasium, if we can get to that for a moment, I take it there are some individuals who don't get picked by other people because they don't have the ability to play?

A Yes.

Q Would you say this is the rules, the school yard rules? Is this not what happens during gym periods at school, on the outside or in the school yard? Would you not experience --

THE COURT: I will sustain the objection. Whatever happens on the outside is irrelevant. It does not have to happen on the inside.

Q Let's get back to the numbers of people waiting. How many people would you estimate use the gymnasium during the gym period?

A I count over 50.

Q You count over 50?

A Yes.

Q How about as much as 75?

A I would say that much.

Q In excess of 75?

A No, I wouldn't say that much.

Q Okay, you have about 75 people then. Anywhere between 50 and 75; is that correct?

A Yes.

Q The gymnasium, I take it there are six baskets; is that correct?

A Yes.

Q How many men play on a team?

A Eight men on a team and one basketball court that is divided into six baskets. It is very congested.

Q Do you have some men who are using the weights while this goes on?

A Yes.

Q How many men use the weights, about?

A Well, usually you have a set.

Q Right.

A A set, maybe four. A group of four.

Q So four men are using it or is it more than that?

A You always have bystanders, but it doesn't work. It doesn't work that way.

Q Mr. Hayes, as you know, when you lift weights obviously a good percentage of the time you are lifting weights is going to be spent resting. I take it you know that?

A No, you are wrong.

Q You lift continuously and don't rest between repetitions?

A We have what we call a round robbin. We have position of spreads and curls.

Q I am trying to find out how many participate in this round robbin.

A Four.

Q What other activities are there in the gymnasium? Do you have ping-pong?

A Yes.

Q Anything aside from basketball and weights?

A No.

Q Anything other than basketball and weights?

A That is all I see.

Q But you are not going to say that is all there is?

A No.

THE COURT: What else is there that people could use?

THE WITNESS: They have a little ping-pong table on the side.

THE COURT: But you have not seen people use it?

THE WITNESS: No, it is chaos.

THE COURT: Anything else?

THE WITNESS: That is it.

THE COURT: And other people sit in the bleachers?

THE WITNESS: There is no bleachers. They just stand around.

THE COURT: I thought somebody said there were bleacherts.

Q Mr. Hayes, you have then room for 40 people to play one period of time, you have four people using the weights or thereabouts. So I take it there are about 10, 12 people standing around? Is that a fair estimation?

A More than that.

Q How many more?

A My courts where I play we usually have two teams waiting.

Q How many men?

A About 16.

Q Mr. Hayes, are you a good ball player?

A Yes.

Q Do you play in the group that consists of the better basketball players?

A I do.

Q I take it -- is it your knowledge that people are more desirous to play in your group?

A Not everybody, no.

MR. TOBIAS: No further questions.

REDIRECT EXAMINATION

BY MR. HERMAN:

Q Mr. Hayes, when you discussed post-meal sanitation, does that take place in the dayroom?

A Yes.

THE COURT: Only? I think Mr. Tobias was asking you how long it took to clean up tiers in the flats after breakfast.

THE WITNESS: He said the post-meal sanitation. That is different.

THE COURT: How long?

THE WITNESS: That has nothing to do with the other sanitation at all. They have a special group for that. That is the messhall outfit.

Q But they have to share all the equipment; is that correct?

A Yes, they have to share it with the tiermen.

Q So they cannot start until the tiermen finish?

A But the dayroom has to be used where they feed in the messhall for the population when they come out.

Q So when you were referring to post-meal sanitation you were referring to sanitation in the dayroom?

A Yes.

MR. HERMAN: I have nothing else.

THE COURT: Thank you, Mr. Hayes.

(Witness excused.)

THE COURT: Have you any other witnesses?

MR. HERMAN: No, your Honor.

THE COURT: Yes, Mr. Tobias?

jwrm 12

MR. TOBIAS: Your Honor, I am not going to recall rebuttal witness at this time, but I would like to introduce evidence that was used at the Giampetruzzi trial.

THE COURT: I will consider it.

MR. TOBIAS: Your Honor, as you know from the Giampetruzzi trial the only area in which inmates' movements are monitored and recorded is the 1-B area. While we are not saying the 1-B area represents a large portion of the institution numerically, these logs, and I think the summaries that will be attached with them that your Honor has seen, will indicate at least as to one particular area where the inmates' activities are recorded that when the people do get seconds to go to gym or yard periods they do, in fact, go. And these are being introduced for that purpose and that purpose only.

THE COURT: I will not accept it for that purpose, because I think the situation with regard to 1-B is essentially different than that with regard to other parts of the institution.

If you want to recall the officer to answer any points made by the plaintiffs' witnesses, I would be glad to hear anything.

Frankly, I must say I do not think there are any substantial differences between the testimony on each side.

jwrm 13

Officer DePass said only about 50 people used the gym at one time, your own witness. Mr. Hayes said he saw about 75 there. Insofar as it is a question of using the facilities or not, I do not find any major differences.

MR. TOBIAS: I think that is one point the plaintiff was trying to bring out. The other point was that Mr. Hayes and the fellow before him, I think, testified even when they were scheduled to go for some reason, the Correction personnel neglected to bring them up to the gymnasium and we can show at least where it is recorded. And this is the only area where it is recorded-- they in fact do go on the scheduled time.

On the log sheets you will see every week --

THE COURT: I don't mean to overlook the possibilities, but there are some reasons I can understand. I can understand Christmas, for example.

I think the major differences, No. 1, whether the amount of time that is roughly speaking agreed to during the winter schedules on both sides in particular as distinct from the summer schedule is adequate, No. 2, whether there is any serious impediment of getting out of doors in the summer because you are busy at the moment because the doors are slammed and that is it; and, no. 3, whether -- well, those are the major questions. I do not find the burden of

the complaint here is on the whole when gym is called, but when it is called if facilities are inadequate.

If you want to recall anybody to rebut, all right.

MR. TOBIAS: I take it you will accept the logs?

THE COURT: No.

MR. TOBIAS: I will recall Officer DePass.

MR. HERMAN: Your Honor, may I call Mr. Hayes back for one question?

THE COURT: On what subject?

MR. HERMAN: On recreation.

THE COURT: What is it you want to bring out?

MR. HERMAN: The frequency of times his block was permitted to go to the yard in the summer.

THE COURT: Yes.

MR. HERMAN: Yes.

B R U C E M E L V I N H A Y E S, recalled.

DIRECT EXAMINATION

BY MR. HERMAN:

Q Mr. Hayes, were you in Rikers Island during the summer?

A Yes.

Q How often was your block called, your side called for outside yard each week?

A Well, there is a schedule that we are supposed to

go four times a week, but since I have been there the most we ever went was twice.

THE COURT: How long have you been there?

THE WITNESS: I have been there since the summer.

THE COURT: When?

THE WITNESS: Six months.

THE COURT: From now to July?

THE WITNESS: Yes, to June.

Q The most you went was twice a week?

A Yes.

Q Were there any weeks when you went only once a week?

A Yes.

Q Did you ever go four times a week?

A No.

MR. HERMAN: I have nothing further.

CROSS EXAMINATION

BY MR. TOBIAS:

Q Were you acquainted with the yard schedule that was in effect for your housing area?

A Yes.

Q What was the schedule?

A Four times a week.

Q What days?

A Tuesdays and Fridays, morning and afternoon.

Q What else?

A That is it.

Q In other words, you go twice a day during those two days. Any of those times when you missed the period was it raining?

A Yes.

Q That is the reason why the period wasn't given?

A Yes.

MR. TOBIAS: I have no further questions of this witness, but for the record I would like to make an offer of proof with respect to the log I just referred to previously.

THE COURT: You have offered it and I have denied it.

Thank you, Mr. Hayes.

MR. HERMAN: Your Honor, one question.

REDIRECT EXAMINATION

BY MR. HERMAN:

Q Mr. Hayes, were there certain days when you were scheduled to go to the gym and the weather was good and you were not taken -- the yard, I'm sorry.

A Definitely.

MR. HERMAN: All right.

(Witness excused.)

jwrm 17 DePass-direct

MR. NUSSBAUM: I would like to recall Officer DePass.

F R A N C I S D E P A S S , recalled.

MR. NUSSBAUM: Your Honor, the question has come up as to the access of the inmates to the gym. In the event he misses the trip --

THE COURT: To the yard?

MR. NUSSBAUM: To the yard, pardon me. I think we can clear that up now.

DIRECT EXAMINATION

BY MR. NUSSBAUM:

Q Officer DePass, what happens in the event the man doesn't go to the yard when the call is first made? Let's say he comes down later and finds the door to the dayroom locked, what can he do?

A He asks the officer if he can get out.

THE COURT: Where is the officer that he asks?

THE WITNESS: The "B" side of the block. He keeps the dayroom key.

Q After the officer unlocks that door, what stands in the way of the inmate going to the yard?

A The officer who has the door leading out into the yard keeps the count.

THE COURT: Keeps the count, did you say?

THE WITNESS: Yes, there is a count kept of the inmates.

THE COURT: All right. You are out in the yard and here is the "A" side and there is the "B" side and I come downstairs and want to get out in the yard, what do I do, knock on the door?

THE WITNESS: No, you have to find the officer with the key.

THE COURT: Is there anybody on my side to find?

THE WITNESS: All right, came back and you tell the officer what side of the block you are on and say like the "A" side is the yard, so he will let you on the "B" side and the officer on the "B" side that has a dayroom key will let you in.

THE COURT: Let you in to the yard or the "B" yard?

THE WITNESS: Into the day room.

THE COURT: And you let him out of the dayroom?

THE WITNESS: No, I am out in the yard.

THE COURT: Who lets him into the dayroom?

THE WITNESS: The officer on the door.

THE COURT: Three different officers involved then, is that right, if you are on the "A" side?

THE WITNESS: That's right.

THE COURT: If you are on the "B" side you only have two diff nt officers?

THE WITNESS: That is correct.

BY MR. NUSSBAUM:

Q Isn't it true that that dayroom door must be locked to prevent inmates from going from the "B" side when the "A" side is out there?

A That is true.

CROSS EXAMINATION

BY MR. BERGER:

Q The officer on the door of the dayroom is out in the yard?

A He is out in the yard by the door.

Q Does he always stand right at the door?

A There is one officer on the door, another officer, and the recreation officer is in the middle.

Q That officer is always positioned right at the door; is that correct?

A Yes.

Q These other officers involved, the ones who let you cross over if you have to cross over, and the other one with the key to the dayroom, do they have anything to do at this time aside from opening the doors for the people?

A That is their post. They are supervising that

side of the block.

MR. BERGER: No further questions.

THE COURT: Thank you, officer, you are excused.

(Witness excused.)

THE COURT: All right, gentlemen. I guess that concludes the hearing. I would like to see counsel in the robing room to talk about how we will proceed from here.

(Recess)

(In the robing room.)

THE COURT: The hearing is declared closed. I will hear counsel sum up in oral argument for half an hour each on Monday morning in this courtroom. That is a week from today.

The City is requested to submit a proposed counter-order at that time and the plaintiffs are authorized to submit a revised proposed order if they wish to.

The marshal is authorized and instructed to see to it that the witnesses who are brought over here are returned to Rikers Island and I hope you all get back with no trouble.

(Adjourned to Monday, January 20, 1975.)

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JAMES RHEM, et al.,
Plaintiffs,
vs. 70 Civ. 3962
BENJAMIN J. MALCOLM, et al.,
Defendants

Before: HON. MORRIS E. LASKER, D.J.

APPEARANCES:

WILLIAM E. HELLERSTEIN, ESQ.
Legal Aid Society
BY: JOEL BERGER, ESQ.
STEVEN A. HERMAN, ESQ.

ADRIAN P. BURKE, ESQ.,
Corporation Counsel, City of New York
BY: DONALD J. TOBIAS, ESQ.

January 21, 1974
10:00 a.m.

'75 JAN 31 AM 5 36
LAW DEPARTMENT

(Case called.)

MR. HERMAN: Plaintiffs are ready.

MR. TOBIAS: Defendants are ready.

THE COURT: Gentlemen, I notice we are starting ten minutes late unfortunately and I have a trial which is being conducted and which resumes at 11 o'clock, so I will divide the fifty minutes that we have evenly between you and be glad to hear whatever you have to say within that period of time. Mr. Berger or Mr. Herman can have until 25 minutes of and Mr. Tobias can go on from there.

MR. BERGER: Thank you, your Honor. Your Honor, I would like to begin this morning by perhaps putting the proceeding that we have just had over the last few days into

perspective somewhat.

What we have really had here in my view is not so much a hearing that wound up shedding much light on what people's rights ought to be so much as a hearing on the subject of relief. I really don't think that anything was established that showed material differences between the two institutions to the point where the basic rights that this Court decided in its opinion of last January of 1974 should in any way be altered.

What we really got around to doing for the first time in this case was to get down to the brass tacks of relief precisely what the measure and scope of relief ought to be.

We never really reached that stage with regard to the Tombs because of the unusual course of events that took place. I think on two issues I can be very brief here about classification and contact visits.

The City is apparently coming up with some kind of a plan. Plaintiffs feel that whatever the City is thinking about doing, that at this time we must have a Court order on these two issues. That we would like to not so much have a plan in 90 days, we would like to begin contact visits within 60 or 90 days.

Now it has been a year since your Honor decided the case and we do not know precisely what the City plan is

going to be. We do not know whether they are going to say contact visits for ten or twenty percent of the population. Contact visits once every two weeks, and I do not think we should have to await that. The Court made some pretty basic findings about contact visits in its finding and was quite solidly affirmed on this subject by the Court of Appeals.

Really most detainees can safely be given contact visits. I recall at the trial Warden Gengler testified that even the greater security risks in his institution, he would be willing to give them contact visits. He would simply scrutinize them a bit more or watch them a bit more closely while the visit was taking place, but that was no reason to deny a contact visit. That is at page 32 of the testimony.

So that --

THE COURT: It could be argued that it has caused some problems in his institution. The question then arises whether the risks involved have to be taken.

MR. BERGER: Yes, your Honor. I am not aware that any of the difficulties that they have had at that institution --

THE COURT: The most recent escape resulted in an indictment in which a visitor in the place was charged with having spirited in contraband or at least assisted some of his co-defendants with having escaped, but I am fully aware

corm

of the fact that contact visits will increase the risk. The question is the extent to which it is reasonable that it should be increased.

MR. BERGER: Yes. We feel that the order should essentially place the burden on the City with regard to denying contact visits to any particular individual; that the presumption should be that most detainees can have contact visits and that the City through a classification system would have to establish the contrary.

THE COURT: That has been decided.

MR. BERGER: We next come to the issue of visiting hours which probably was one of the most hotly contested here. This is the second time we have had a hearing, a relief hearing on the subject of visiting hours, and I am sorry to say that since the first hearing we had in March of 1974 we have actually regressed a bit in the extent of the visiting program.

At the time --

THE COURT: The first one had to do with the Tombs?

MR. BERGER: Yes, that is correct, but if you compare the visiting program they had at the Tombs even a year ago and the program at Rikers Island today, you find that there is actually a great deal less in the way of visiting hours made available.

At the time we had that hearing the detainee at

the Tombs could have a visit five days a week, 45 minutes for each visit; that came out to a total of 225 minutes in the week.

The visiting periods were spread throughout the day beginning as early as 1:15 to 2 p.m. and running as late, the last session was 7:30 p.m. to 8:15 p.m.

In addition children could visit any day of the week.

At the House of Detention for Men today, the visiting sessions are only thirty minutes long, four days a week plus every other Sunday. If my mathematics are correct, that would be 120 minutes a week times two is 240 plus thirty minutes every other Sunday is 270 minutes in the two-week period or four-and-a-half hours.

At the Tombs it was 225 times two, which is 450 minutes, seven-and-a-half hours.

THE COURT: Every two weeks?

MR. BERGER: In a two-week period seven-and-a-half hours in the Tombs last March and four-and-a-half hours at Rikers today. In addition the whole notion of being allowed visits four days a week at Rikers Island is a bit deceptive really. Mrs. Davis' testimony showed that. It is possible to get to the Tombs every day. The whole thing could be accomplished in about two or three hours, door-to-door.

From the moment you leave your home until the moment you get back to your home. To go out to Rikers Island is an all day affair. If you add up the time sequence in Mrs. Davis' testimony, you come out to about six or seven hours from the moment you leave your home to the moment you get back to your home. It is almost as big an event as traveling to any of the nearest upstate prisons such as Sing Sing, Greenhaven, Wallkill or Abnock, the various prisons in the suburban counties surrounding New York City.

It is going to be very difficult for people to make that trip every single day. It struck me that even accepting the City's present visiting hours, if you were to do that, it seemed odd that they should have gone from two days a week to four days a week on Rikers Island. I was curious why they did not expand it for perhaps an hour a day two days a week because people are not going to be able to come back every single day. It takes up an entire day of their time.

THE COURT: Are you saying that if there were to be a revision, you think the emphasis out to be on lengthening the visiting hours? If the Court concludes that one has to weigh lengthening the visiting hours against the number of visits that lengthening the visiting hours is the first point that ought to be dealt with?

MR. BERGER: Yes, lengthening the visiting hours

and also providing more convenient visiting hours.

Here is another point that came out. There is no visits at HDM, for example, in the evenings, which is the only time that people who work could go. At the trial of this case Mr. D'Elia, I recall, stressed that evening visits are actually most important. That is at page 1288 of the record. You may recall at the time of the trial the visiting hours in the Tombs were primarily in the evening. We were asking that they also be expanded to other times of day for women who have children in school and so on and Mr. D'Elia at page 1288 of the record goes into some detail as to why evening is the best time to run your visits.

There should be much greater use of weekend visiting. Your Honor may recall in the opinion there is reference to the Board of Correction report which noted how many other cities do have extensive weekend visiting programs.

As you know, at the upstate prisons, weekends are by far the heaviest visiting times because of the distance that is involved.

So that for Rikers Island especially weekend visits are critical.

It is interesting to note, by the way, that the length of time that Mrs. Davis testified to the incredibly long delays involved are corroborated elsewhere in the record

of this case. I was a bit surprised to see that. The Board of Correction report on visiting actually studied several institutions and one of the institutions they had studied was the institution that we are now dealing with, at the time it was called the Adolescent Remand Shelter you may recall from Warden Thomas' testimony.

THE COURT: I do not think you need to press the point too much. I am glad to hear there may be something about it in that report because I do not think that the City seriously contends that it does not take a long time to get to Rikers Island and back again.

MR. BERGER: Also the logistical delays at the institution itself.

THE COURT: There is no substantial dispute about that issue.

MR. BERGER: That is at page 12 of that report.

THE COURT: We know the time it takes from Warden Thomas.

MR. BERGER: Another fact that is interesting to note is that there was a good deal of testimony at this hearing about the frustrations that the visitors encounter. The necessity of having officers in the reception area who are particularly sensitive and I really do not recall very much of that coming up in our visiting hearing of a year ago or at

the Tombs trial. It is obvious that the long time it takes to get out to Rikers Island and the delays one encounter out there do create a very difficult situation for people.

Finally, I would like to note that as a result of this hearing comparing it with past testimony we have some statistical evidence that there are far fewer visits out at Rikers Island than there were at the Tombs. I suppose that is not surprising in view of the difficulties of transportation, but also to some extent it bears on the importance of expanding the hours to at least make it as feasible as possible for people to visit.

Warden Thomas testified that his visiting had just gone up a vit with the Tombs transferees and in the first week of 1975 he ran about 100 a day.

THE COURT: Where is this?

MR. BERGER: At pages 184 and 185. He got about 756 visits the first week of 1975. That comes out to about 100 a day, I think a little more because New Years Day is in there.

At the trial of this case Chief of Operations D'Elia testified that in January of 1973 when he was testifying the Tombs was running 200 visits a day. That is at page 1228 of Mr. D'Elia's testimony.

Now, pursuant to our stipulation of settlement in

the case, the population of the Tombs at that time would have been down to around 1100, whereas the population of HDM, as Warden Thomas testified, is up to around 1500.

Warden Schaefer at the time of our visiting hearing last year, Warden Schaefer of the Tombs, testified that in February of 1974 he was running about 125 visits a day. That is at page 30 of the transcript of the hearing on visiting and at that time you may recall the population of the Tombs was way down to around 700 or 800.

THE COURT: Yes.

MR. BERGER: So that the least we can do, given the difficulties of people getting out there, is to make the hours more flexible and to run the visits at a time when it is easier for people to come.

I would like to remind your Honor that in the opinion you referred to the American Correctional Association minimum standards that state that an hour is the bare minimum for any visiting session and particularly stressed the visiting hours should not be set up purposely to suit the convenience of the institution.

I would also like to point out that still at HDM you only can have one visitor per visit except on these Monday nights when children can come.

Your Honor noted in the opinion that at the Tombs

before the 1970 riots people could have as much as three visitors on any one visit and particularly people who have children, if they could do it at the Tombs every day as of last year, the least they could do is allow children to come every day at Rikers Island also.

Now, admittedly there are going to be administrative problems. It may require additional facilities both at the institutions and probably at the bridge reception area as well, but it is not our client's fault that the City chose to put 4000 or 5000 inmates in four or five institutions out on Rikers Island. It is certainly not the fault of our clients that HDM has the most limited visiting facility in the entire city correctional program, but it happens to be at that institution.

If you add up the number of visiting booths, facilities per individual, you find that HDM and its sister institution, the Adolescent Detention Center, together they have roughly half the visiting space per inmate than the other institutions have. I calculate it to about one booth per 25 minutes for HDM and ADC combined, whereas it runs an average one per minute at the Queens House, one per 14 in Brooklyn, one per six at the Womens House of Detention, one per eight in the Bronx.

They have limited facilities out there and I do

not think our clients should have to wait two years. I think our experience in this case is any indication, if Warden Buono estimated two years, it will probably be closer to two-and-a-half and three and that is not the fault by any means, but just the facts of life that we have to deal with. Of course there are going to be administrative problems, but if this case means anything at all really it is that we can not accept the current facilities, the current level of staffing as given because if we were to do that the Tombs would still be open and the case of Rhem v. Malcolm would practically be meaningless. What has to be decided are minimum visiting hours that people are entitled to and once the Court determines that certain hours are minimally required under the Constitution, at that point the City has to provide whatever is necessary to give that degree of visiting.

THE COURT: How do you decide what minimal amount of time of visiting of numbers of visitors and occasions of visiting are required under the Constitution?

MR. BERGER: Your Honor, to some extent it is arbitrary when you get down to fixing the precise number or number of hours, I agree with that, but I think you can look at the present situation and determine as you did in the original opinion that this is inadequate and decide how much of an expansion of that you feel would minimally be required

to at least allow people to get to see detainees on a fairly regular basis. Remember, if they had made bail, they could be seeing anybody they want at any time.

THE COURT: I know, I do not mean to brush that aside, that is a very important concept, but it does not get us anywhere in the solution of whether there should be seven hours visiting or four hours visiting.

MR. BERGER: I agree and I think the Courts regularly, in the area of civil rights, are required to fix numbers, percentages, days, hours and so on and it has always been arbitrary.

THE COURT: I am asking for suggestions as to specificity on the part of the parties. It is very well for you to propose these principals and there is a good deal to be said for them. There certainly is a good deal to be said for trying to overcome the irrelevancy, if it can be overcome, that where a man was found to have had inadequate visiting privileges at one institution, before that could be cured when he was transferred to another institution, he has even less at the second institution, but in the long run we all have to get down to specifics and I was wondering --

MR. PERGER: Our proposed order stated rather than getting into detailed hours, we said the visiting facilities should be open for most of the day and people when they come

should be able to stay as long as they want to unless the facilities are overtaxed. If they have run out of room, then the people who have been there the longest would be asked to leave. We suggested as a minimum two hours per visit and we based that upon your Honor's equal protection rezoning in this case that is the bare minimum they get per visit at the New York State facilities. On weekends when it is croweded up at those facilities it is limited to two hours and that on other days when it is not crowded people can come and stay as long as they want to as long as the facilities are not overcrowded.

Warden Gengler testified that that is the way he does it at his institution. He does not have the two hour, the specific two hour thing, but if his facilities are not crowded, he just lets people stay. He is not in a situation where I have only two officers to run this program --

THE COURT: Don't you think it is likely the facilities will generally be crowded particularly if the length of visits are expanded?

MR. BERGER: Yes, I think it will be crowded, but I would suspect that at many hours of th day they will not be filled to capacity. Just to draw on my own experience, up at Sing Sing, counsel visiting takes place in the same room as the family visiting, it is crowded, but I was never

there on a weekday when it was absolutely filled to capacity. Perhaps on weekends it is. That is why on weekends it has to be more limited.

THE COURT: I think you had better go on to some other subjects, you only have about five or six minutes left.

MR. BERGER: On the subject of recreation, I think the testimony was strikingly similar to the trial we had in this case originally in many respects. For eight months of the year at HDM detainees only received one hour a week. That is according to the schedule and the testimony of two different detainees indicated that at least in December of last year that schedule was not always followed.

The gym is crowded, just as the roof area of the Tombs was crowded and there is not going to be a new gym ready for at least a couple of years. Warden Thomas said he was hoping to develop another gym from a converted messhall, but he had no way of knowing whether or not that could be accomplished.

The yards at HDM are certainly an improvement over the Tombs. Nobody disputes that. But the detainees really do not go to the yards that often. The schedule of four times a week is not observed and the yards --

THE COURT: If it were observed, would you consider it adequate?

MR. BERGER: No, your Honor, because the testimony at trial was uniform that the bare minimum is one hour per day. This was Mr. Goff's testimony, that was Mr. Anderson's testimony, that was the standard set forth in United Nations' minimum standards. Mr. Goff stated that one hour a day is the bare minimum, the absolute bare minimum and that it should be even more if there is a dearth of activities. That was at page --

THE COURT: I am sure I can find it.

MR. BERGER: 390 and 391 of Goff's testimony and 207 of Anderson's testimony. The UN standards were cited in your Honor's opinion.

There was also the American Correctional Standards which called for daily exercise and they recommended jails be placed in rural or suburban areas for this purpose which I think is clearly an implication that they meant that to be outdoor exercise.

Your Honor may recall that at the trial we had testimony of an inmate, a Mr. Ruben Fein, who testified how in the winter at Sing Sing, I think it was in the month of January, he was going out in the yard two or three hours a day and jogging and how important this was in relieving tension.

Now, the City's defense at that time was that the

Tombs was in the middle of the city and we cannot provide yards. There is an awful lot of room on Rikers Island. Mr. Van denHuffle testified about that that there was lots of land not being used. There is no need to push people into these postage-stamp yards which by defendant's own admissions at this hearing are inadequate for the present number of detainees.

I noticed Warden Thomas at page 157 and again at 169 to 170 and Officer Pass at page 236 and 237m basically they said that if the population went down, our yards would be adequate for everybody to participate, but that is not what they have at the moment and they conceded that.

You may recall that the City original stated that it was going to -- there was going to provide outdoor recreation in the yards into wintertime. That was in the offer of proof and then the City went back on that.

Particularly I am impressed by the fact that even under the City's schedule there is no outdoor recreation on weekends which is a time when no one is in court, a time when everyone is around and it would be one of the best times. The City's defense in this area, they mention push-ups, which of course your Honor already spoke of in the original decision as being inadequate. There was some discussion of the ability to play handball on the blocks. If you look at the City's

brief in Giampetruzzi, you will find that only four inmates can play handball.

I notice the City's offer of proof on recreation went into some detail on the programs. We also have all these wonderful programs at HDM to counterbalance the need for recreation. There was no testimony about that at the hearing. If you look at the City's brief around page 69, 70, 71, a very detailed description of how limited these programs appear in the brief on those pages, well under 100 or 1500 detainees participate in these programs.

THE COURT: I think you had better talk about lockin and lockout.

MR. BERGER: Yes, on the subject of lockin and lockout the testimony was not that different than we had at the Rhem trial. It is basically the same kind of schedule.

THE COURT: I take it that the position of the plaintiffs there is that if the City argues that lockin is primarily caused by the necessary for cleaning the place up and this, that and the other that that time could be shortened very substantially and, therefore, people could be locked out considerably more.

What about the optional features of it. It is always a question of manpower.

MR. BERGER: Yes, your Honor, a few other factors.

Some of the times that people could be locked out really are not very much in dispute, particularly in the evening. I refer your Honor to Commissioner Malcolm's testimony at trial. He stated at trial that the City was programming to lock out until 11 o'clock at night in all of its institutions. That was two years ago he said they were about to start doing that.

That is at pages 1151 and 1191 and 1201 of the record of the trial.

I was also struck on lockout just with the number of hours that people are locked in for counts is rather extraordinary. Assuming that we are going to have classification and some medium and minimum security people, three-and-a-half hours out of the 24-hour day are spent counting people. Seven counts a day. It seems extraordinary.

The sanitation after meals, by the way, is much simpler at HDM than it was at the Tombs because they ate in the dayrooms. In the Tombs you had to clean up the whole lockout corridor. You do not have that problem at HDM. The meal sanitation takes place in the dayrooms.

Finally, on the subject of optional lockout. There is no question that we have had some improvement in this regard. There was no optional lockin at the Tombs and there is some at HDM.

But as we pointed out again at this hearing,

frequently people are ill or the need for privacy is there throughout the day, not just in the hours that it is most convenient for the City. In this regard I was struck by one aspect of the City's defense. They said that if people chose to lock in in the morning or afternoon hours, they wouldn't be able to go to programs and it would take much longer for them to receive their visits. We are talking about something that is an option and as long as detainees are informed that is something that goes along with the option, then that is up to them to decide. If a man chooses to lock in in the morning or afternoon, he is not going to be able to go to the yard, or to the gym or to a program during that period.

Also a man can simply be told if he chooses to lock in during a period when visiting is taking place that he probably shouldn't do that if he is expecting a visitor because it is going to be very discourteous to his visitor. He is going to have to wait a great deal longer. We are talking about option and as long as somebody is told that that is a possibility, then that is his choice to decide.

THE COURT: Okay, I think we will let Mr. Tobias stand up now.

MR. BERGER: Thank you, your Honor.

MR. TOBIAS: Your Honor, I find it somewhat disconcerting that the plaintiffs fail to take into account

the very many problems that the defendants introduced at the trial with respect to all of these issues.

THE COURT: Mr. Tobias, you see the trouble and the City does not ever seem to recognize it. We are not talking about problems really here. We are talking about what rights people are entitled to. If they are entitled to those rights, then you have got to supply them no matter how tough it is.

MR. TOBIAS: When I say problems, I am talking about what it takes to run an institution regardless of -- what we have to do is analyze a particular institution that we are involved with and after examining the institution, then we can evaluate what can be done. I do not think that the presentation by Mr. Berger took any of this into account.

THE COURT: I differ with you to this extent: I agree with you that we have to analyze the problems of an institution or what can be done. I would say that I conclude that every single thing that the plaintiffs have asked for can be done at Rikers Island if this community chooses to devote the resources to do it. Then it becomes a question also as to the extent to which it makes any sense to require the expenditure of resources.

You could build three more bridges going over to Rikers Island if you want to. You can run a transportation

system there. You can build another building for processing visitors. You can put on twice as much staff so it is not a question of whether these things are possible, it is a question -- it always keeps coming back to what the plaintiffs are entitled to recognizing some of the other factors that you bring out.

MR. TOBIAS: I think, your Honor, we have to take into account what we have at the present time to work with. It does not mean to say that there can be no improvements in the future.

THE COURT: That is another thing. You cannot, of course, improve things overnight.

MR. TOBIAS: We can certainly envision an ideal situation. We can hypothetically reconstruct another institution, but I do not really think that is the job of this Court. I think we have to analyze what the problems are --

THE COURT: But it is the job of the Courts. On the question of contact visits I have, as you know, long since concluded that except where you can demonstrate that a particular person having contact visits will cause a threat to the security of the institution or a threat that he may not show up for trial because he may escape, you will have to allow contact visits. Whatever you have to do for that you

is that I have seen two physical facilities in which it is envisioned that these visits will take place. This facility has to be cleaned up, revamped, etcetera. Your Honor knows the problems inherent in doing this and I am going to say that I do not see how this can be done under the time frame specified by Mr. Berger.

I think it is reasonable to assume that since the focal point of this lawsuit has dramatically and suddenly shifted to another institution, the City is going to have to be given some time of implementing the Court's order in another institution. I do not see where that is unreasonable at all.

With respect to the regular visits that Mr. Berger concentrated on, I would like to state that Rikers Island, the facility itself, and the way it is set up naturally causes certain delays. I think that there was expansive testimony on this, but in analyzing these delays these are not delays that were put in there and which could be eliminated very easily nor were they put in there simply for the convenience of the defendants.

In fact, security precautions must be taken. There are in fact two different security checkpoints. One at the central location, one at the institution itself. There is nothing that can be done about this. These are things that

the administrators believe must be followed through and unfortunately it does take time to frisk everybody at two points, check everybody in. There is nothing that can be done about this.

THE COURT: There has never been any testimony that I recall as to why there have to be two searches or two checks and it is not entirely clear to me that just because you are coming over to a little island across the bridge where, as a matter of fact you are screened in a sense more as a possible entrant, that more checks are necessary on the island than would have been necessary here in the heart of Manhattan.

MR. TOBIAS: Your Honor, the only problem is, you are entering two different areas and the administrators have determined that there has to be a check upon entrance of each of the areas.

THE COURT: I know, but you say that as if the administrative decision is holy writ.

MR. TOBIAS: I do not believe there has been testimony in any way stating that this is an unnecessary factor. I would like to state that this in itself is not overly time-consuming anyway. It is basically the transportation process after the checkpoint and the collection of money and the searching of inmates, of clothes destined for the inmate that takes the great bulk of the waiting time.

Also, it is the process of getting the inmate down from a large expansive cellblock area that contributes to the greatest portion of the delay here. I believe Warden Thomas has stated that he has attempted to alleviate this problem by having the visits in smaller groups of about thirty or forty to cut down on the waiting time; that the thirty or forty people have to go through. In other words, instead of taking eighty people, waiting for eighty inmates, it has been cut down. This thirty or forty number, however, is the minimum number that the institution can have on its visits and still accomplish its goal of getting everybody who wants to see an inmate to see that inmate within the time frame alotted.

Now, when we talk about the specific time frame that has been alotted, I think everyone here has to realize that this is an island, it is shared by six institutions and what is necessary is there to be some staggering at the central control point.

The HDM has been alotted a large portion of the day for reception of visitors. Four of the institutions use this bridge control point at night. Only two institutions, that is HDM, the hospital and a part of the methadone detoxification wing at the Adolescent Institution use it during the day.

There are certain limits in terms of what can be done during the day. As Warden Buono testified, during the early morning hours we can't have visitors come over because of the basic traffic patterns that exist there: the employees that must be checked in, the changing of correction officer shifts, things of that nature. Also, Warden Buono testified that the on-going occurrences at the institution themselves, the feeding process, in his judgment should not be interrupted at least until lunch.

So basically we are dealing with a time frame from anywhere from 12 o'clock until 4 o'clock, which is available for inmates to see visitors at MDM.

I think the testimony clearly established that within this time frame one half hour per inmate would allow all those people who had come in to accomplish their visit. Expanding this to any greater degree --

THE COURT: Suppose you have a working wife. How is she going to visit you?

MR. TOBIAS: Your Honor, as you know, there is a weekend visit.

THE COURT: Every other weekend.

MR. TOBIAS: Yes, and there is an evening visit. I would say --

THE COURT: An evening visit?

MR. TOBIAS: ON Monday, with a child.

THE COURT: Suppose you are a working wife that doesn't have a child? You get to see your husband half an hour every other week, right? I am not unsympathetic to the City's problems, but I am trying to figure out what it results in.

MR. TOBIAS: That would be correct if you didn't have a child and couldn't come during the week, but obviously in every situation certain sacrifices are going to have to be made. I don't want to sound heartless about this, but you have a large setup out here, and there has to be some division in terms of utilization of the control points.

THE COURT: I hope it doesn't sound as though I am ruling against the City when I say this, but I am not. I find myself feeling somewhat here is where I came in, in that in the original Tombs discussions I was always told that the problems that the plaintiffs were attacking were integrated largely in the character of the building and they couldn't be cured, but after all, the City was responsible for creating and maintaining the building that it had.

Certainly you are right that the problems you have a Rikers Island are caused by the situation which exists, but the City created the situation.

MR. TOBIAS: Your Honor, it was a nice, open,

empty island once, fifty years ago. The problem is, your Honor, at the present time in fact, people have an opportunity to receive visitors in effect six days a week, five or six days a week, depending upon the circumstances. We do not feel that this is in any way constricting.

As you have stated, there were certain limitations here, as you pointed out, but Mr. Berger brought up other institutions in the city. He stated he brought in Mr. Brickman's testimony. In fact, I happen to know -- of course it didn't come out on the record but for your Honor's information, this particular visitation schedule is more liberal than most institutions off Rikers Island.

Of course, the Tombs would be an exception, but there we had a unique situation where you had over-staffing, where you had many fewer inmates in terms of the institution's capacity to handle them, so that it was --

THE COURT: There wasn't over-staffing at the time of the trial.

MR. TOBIAS: After the trial. Mr. Berger is talking about what went on after the trial, the four to five visits for those days, and this was made possible due to the unique circumstances existing there at that time. These circumstances don't exist anywhere else.

As a matter of fact, in Brooklyn and Queens and, I

believe, The Bronx, the visiting hours are much more constrictive than this.

I would like to state that I think the testimony of both Warden Thomas and Warden Buono indicate that it is not possible to expand the visitation hours over the half hour if we are going to analyze the relationship of HDM to the other institutions on the Island, and if we are going to complete the goal of insuring that every person who wants to visit during the designated hours actually gets his visit. This is of primary importance, and there must be a division someplace, and I don't think that, based upon the expansive number of days that somebody can visit HDM, that this is in any way unreasonable.

I notice that they brought up the American Correctional Association standards. Those standards were basically formulated for sentence institutions that are basically far away from an individuals home. While some people may state that Rikers Island is very far away, we submit that it is basically two subway tokens away, and it doesn't compare to a situation such as exists at an institution up near the CAnadian border.

THE COURT: Not next to the Canadian border, but it is a substantial trip.

MR. TOBIAS: I think even the testimony of Mrs.

Davis, who was on the stand last week --

THE COURT: I don't need anybody else's testimony. I have been out there twice myself, and by the most convenient possible method, taxi, and even then it is a substantial trip, so there is just no argument about that.

MR. TOBIAS: Your Honor, with respect to the area of lock-out, I think that this is an important area that we went into, and I think that if you evaluate it in terms of what goes on at the institution, and if you evaluate the time sequence as stated and as broken down by Warden Thomas, you will see that people are not put in their cells for anything other than administrative necessity.

People aren't constricted because the Department wants to insure that they don't escape. People are placed in their cells during the designated hours simply to insure that the designated tasks are accomplished.

If you talk about sanitation, the sanitation that goes on in the morning, their own witness, I believe it was a Mr. Murphy, stated that when he cleans the flats and when he mops the flats, a process that takes about forty minutes, which he stated -- this isn't from our witnesses -- he stated it takes about forty minutes, and he stated that he gets it done more expeditiously, and in fact he stated in response to my question that it could not be done if people

were out on the flats.

THE COURT: I will review the testimony, but I certainly have a distinct impression that, because of ridiculous shortage of basic supplies like brooms and things like that, that things could be improved.

MR. TOBIAS: If you analyze that testimony, you see that testimony also fails. They stated that they get their sweeping done in -- some of these fellows said they would get it done in five minutes. I asked them whether they get it done well, and they said yes. If they get it done so expeditiously and get it done so well, I think the inference has to be drawn that there really aren't these shortages of supplies. I think that was exaggerated testimony. I don't think it was worthy of belief.

THE COURT: I can't just disbelieve it because you don't think it is worthy of belief. Why didn't you bring somebody in here to tell me it was not so?

MR. TOBIAS: Your Honor, I didn't feel it would be worth the Court's time, because even if it was so, and I am not saying it is, but even if it was, this doesn't represent a large amount of time anyway.

THE COURT: That may be.

MR. TOBIAS: If you have fifteen men cleaning a tier, I don't think it is unreasonable to keep the people

off the tier for 45 minutes, and that is the time span that is involved.

If you analyze it from the morning, from sunrise to sunset, you will see the people get up at 5:15, the first process that takes place is the process of preparing the people to go to court. This is the basic function of a detention institution, readying people for court. If they are not going to be readied for court, there is no purpose for them to be there in the first place, so the administrators have to make sure that the people who are being readied for court don't get intermingled with everybody else, and they have to make sure that these people get their food, get their commissary, and get their services ahead of everybody and separate from everybody.

This takes place early in the morning, and in such a way so as to insure that these people are separate from the other people. This represents about 25 percent of the institution. It is not a small number of people, and we submit that this is a reasonable ground for keeping the people locked in during this time frame.

They are not really locked in that much simply because during this time frame, they come out for breakfast for about 45 minutes.

In addition, we have heard testimony that at about

7:15 the pre-count takes place. This is the process that takes place before the major house count that takes place at 8 o'clock. The counting should not be minimized. Even Warden Gengler's testimony shows that counting at his institution took place at even more frequent intervals than was the case at HDM.

THE COURT: Where will I find that?

MR. TOBIAS: Your Honor, I don't have a page reference for it.

THE COURT: I don't remember such testimony. I don' remember asking him about it.

MR. TOBIAS: I could be getting my cases confused. Mr. Gengler definitely made such remarks in the Velvano trial.

THE COURT: I think it must be from that trial.

MR. TOBIAS: I know for a fact that he stated that he counted at least seven or eight times. I cross-examined Mr. Gengler, so it sticks out in my mind. Your Honor --

THE COURT: I don't pretend to be an administrator, and I don't mean to get into that act, but I can't imagine why four counts a day, for example, shouldn't be enough.

MR. TOBIAS: Mr. Berger brought out the point, three and a half hours is spent counting, so it must be a security function. If you analyze when the counts take place,

actually during the waking hours, it is only three hours. It is the 8 o'clock count, the 12 noon count, and the 4 o'clock count, and of course, the pre-counts that take place before the major counts, that is the 8 o'clock and the 4 o'clock counts.

It is really basically only two counts, and actually three counts during the waking hours have any effect on the individuals.

THE COURT: Plus the pre-counts.

MR. TOBIAS: The pre-counts are part of the 8 and 4 o'clock counting process.

THE COURT: I understand, but they have to be counted as one of the reasons for keeping people in their cells.

MR. TOBIAS: Yes, that's correct, your HOnor.

THE COURT: They add up to an hour and a half, for example, two pre-counts.

MR. TOBIAS: The counting process is about an hour and a half, right. That is a far cry from three and a half hours.

THE COURT: You mean the total counting process?

MR. TOBIAS: Sure. In other words --

THE COURT: The total counting process of waking hours is only an hour and a half?

MR. TOBIAS: The pre-count goes on at 7:15.

8 THE COURT: Until 8.

MR. TOBIAS: It is deceptive because during that time there is also the sanitation, so they are not left in there for the purpose of counting. These are one of the functions that goes on.

Similarly, the same is true with the afternoon count. You have some sanitation going on in the afternoon, and there was testimony about that by the plaintiff witnesses.

So I think that if you examine the sequential breakdown that was given by Warden Thomas, you are going to see that this breakdown is an exercise of administrative discretion that should not be interfered with by the Court, particularly when you have an administrator such as Mr. Thomas, who has been in this business for a very long time, andhas testified as to the various problems that exist.

There was not one shred of testimony that came in in any way countering the basic lockout hour breakdown.

Sure, there was some testimony saying that at certain time intervals could have been shortened, but if you evaluate that testimony, you will see that it is not really substantial.

THE COURT: I think you had better go on to the next subject.

MR. TOBIAS: With respect to inmate recreation, I would like to state that we appreciate Mr. Berger's pointing out that the yard facilities are an improvement over the Tombs. They certainly are. I think that is a given under this set of facts, but what is significant is the number of people that ook advantage of these faclities when they were open. I think there was a greqt deal of conflicting testimony about that.

Officer dePass, who was a recreation officer, and who attends to the inmates both during their hours in the gymnasium and in the yard areas, stated thathe felt there were about fifty people using the facilities at each time.

This figure was never countered by the plaintiffs. I questioned each and every one of the plaintiffs about this subject --

THE COURT: We are talking now about the gym facilities? Let's take the gym facilities. If it was fifty per time, what do you compute each man would get a week? It is still an hour a week?

MR. TOBIAS: It is an hour a week.

THE COURT: I don't think we need to argue about the numbers.

MR. TOBIAS: The plaintiffs are suggesting that the gyms are over-crowded and the yards are over-crowded, and I don't think that this is so. I think that it is interest-

ing to note, they attempted to draw the inference that since it is so crowded, not many people are interested in using them, and that is the reason for their not being so popular a feature of the institution.

This simply isn't so, and that is reflected in the testimony, because each and every one of the inmates who came to testify last week stated that he goeds to the gymnasium most of the time, and he is interested in going.

I think they have countered that themselves in introducing these witnesses.

I am interested in finding out how many people actually took advantage of the gymnasium, and out of a total tier side of anywhere from 120 up through 150 inmates, you basically average fifty inmates per time, which, if you take a look at the facilities that do exist in both the yard and the gymnasium, you will see that there are adequate facilities for this number.

In fact, there are adequate facilities for greater than fifty, but I am suggesting that for the amount of inmates --

THE COURT: Are you suggesting that more than fifty want to use it and aren't able to?

MR. TOBIAS: No, no, I am suggesting that even if more than fifty do want to use it, if you analyze what

facilities exist, you will see that there is room for more than fifty people to use it.

THE COURT: I still think it comes down to the question, at least the one posed by the plaintiffs, is whether, if it is fifty, thirty or ninety using it, and that comes to one hour per week, that one hour per week is sufficient.

MR. TOBIAS: Your Honor, certainly during the summertime I think that I would say that there could be no qeustion --

THE COURT: The situation is much better.

MR. TOBIAS: About whether that in fact violates constitutional mandates. I don't think it does. I think that it is quite clear that in excess of one and a half hours outdoors in the yard in a suitable environment such as thos does meet minimal constitutional requirements.

Mr. Goff gave a figure of one hour a day, and he is entitled to his own opinion, but I don't think that that should be construed as a conclusive figure, particularly when Mr. Goff and the other standards that plaintiffs brought out were basically standards devised for sentence facilities.

THE COURT: Mr. Tobias, you will have to wind up with what other points there may be.

MR. I would just like to state in summation,

then, that the defendants have introduced evidence concerning the situation at the House of Detention for Men. It is the situation at the House of Detention for Men that must be analyzed in terms of the duty that the defendants have to provide minimal constitutional standards for the inmates so incarcerated. We feel the test has been met. If you evaluate the testimony, I am sure you will come to that conclusion.

THE COURT: Thank you.

MR. BERGER: I don't want to be discourteous to those who are about to begin, but could I have about 120 seconds just to clarify two points? Warden GEngler on cross examination at page 169 conceded that three and a half --

THE COURT: Of this case?

MR. BERGER: Warden Thomas -- excuse me -- conceded that three and a half hours a day are spent in the process of counting people.

THE COURT: Page 169?

MR. BERGER: Yes. The testimony referred to from Warden Gengler was in the case before Judge Judd, and there is one important aspect of that testimony that was not mentioned which is that for most of these counts, Warden Gengler does not lock people in. They stand by their beds.

THE COURT: Right.

MR. BERGER: Mr. Herman can provide you with a page reference to that if need be.

Warden Thomas -- Mr. Tobias stated that the meals are 45 minutes, and Warden Thomas testified at pages 119-120 that it is about a half an hour per meal.

It is true that Mr. Murphy testified that it takes quite a while to clean the flats. He also testified at page 298 that there is only two men on the help to clean the entire flats, and Mr. Benjamin testified that there are many men on his block who would like to be on the detainee help,who are waiting to get on the help. That is at page 255.

He testified the work could be done faster if there were more equipment and more men. Your Honor pointed out at pages 255 and 256 -- your Honor pointed out in the opinion that the City does have a tendency not to allow as many detainees to work as we could have. That seems to be the situation here.

Mr. Tobias said the yard periods are in excess of an hour and a half. That is not the testimony. I believe it was -- Officer dePass -- it is hour and a quarter under their schedule, perhaps a little less, depending upon how quickly people get out into the yards.

comb

Finally, one concluding observation: It is true that for the most part I think that the issues in this case boil down to how much resources this community wants to allocate to this subject, but in addition, we did see once again in this hearing the tendency of the Department to place extraordinarily high emphasis on security, which is really contrary to your Honor's finding that most detainees need be held in less than maximum se-curity.

Warden Buono, I was astounded to discover, in addition tl all the check points, at page 42, he actually state he was concerned about "a mass assault on the area."

Warden Thomas' testimony, it was considered a security problem to extend the yards, to have fence on three sides instead of only on one side. It was considered a security problem to have several yards going at the same time.

With regard to lockout, it is not purely administrative; it was considered a security problem to have one side lockedout while the other side, etc.

To a considerable extent, it is not justified. There is a continuing emphasis on maximum security for all detainees which is an approach this Court has rejected, and you have been affirmed on that by the Court of Appeals.

THE COURT: Thank you, gentlemen. I hope I

will dispose of this as quickly as possible. You know its problems and my problems in general.

Thank you very much.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

JAMES [illegible] et al.,

Plaintiffs, 70 Civ. 3962

v.

BENJAMIN J. MALCOLM, et al.,

Defendants.

- x

Before:

HON. MORRIS E. LASKER,
District Judge

January 30, 1975

(Proceedings resumed)

THE COURT: I hope I will only have to keep you a very short time.

In pondering a decision in this matter, and reviewing the transcript, I found that I needed some further information that I think either Warden Thomas -- probably Warden Thomas or Warden Buono can furnish me.

I had not in mind making any other statement at this time, but I feel impelled to do so with regard to a matter

that only peripherally relates to the case and certainly has nothing to do with Warden Thomas or Warden Buono, which came to my attention this morning.

I received this morning a copy of a letter that Commissioner Malcolm wrote on January 7th to Harold Baer, Jr., the Chairman of the Special Committee on Penal and Correctional Reform of the New York County Lawyers Association.

It was in answer to Mr. Baer's letter of December 6, 1974, to the Mayor which, according to Commissioner Malcolm, had been referred to the Commissioner for answer on the part of the Mayor.

I read the pertinent portions of the letter which I believe deserve my comment:

"2: In the third paragraph of your letter it is stated that the committee" -- that is, the New York County Lawyers Committee-- "requests that we continue to use the Tombs for those men actually on trial."

That's the introduction to the following material.

Commissioner Malcom then goes on to write as follows:

"In the first place, this is not possible since the order issued by the Federal Court enjoins the Department from housing any detention inmates in the Tombs.

"We are abiding by this Order."

That's the end of the quotation that I consider relevant.

I wish to state most emphatically from the bench that I consider this to be a wreckless misrepresenatation of the status of this case.

As I am sure all counsel for the City know, the Court has yet to issue an order on this subject.

It is the very proposition that is before me at the present time and in no way can it be stated with accuracy or in good faith by anyone that the Federal Court has ordered the Department not to detain any inmates in the Tombs.

I will add that if the Department is in truth relying on such a claim, it has only to apply to this Court for permission to detain inmates in the Tombs, and the Court will be glad to set reasonable conditions under which that can be done.

I have been so authorized, and I have stated on the record that I have been so authorized by the opinion of the Court of Appeals.

It is true that the Commissioner then proceeded to state: "We appreciate your concern about the availability of trial parties, but even if it were permissible to house

a small number of inmates in the Tombs, it would not be fiscally sound to do so."

I take no position as a judge as to whether it would or would not be fiscally sound to do so and I claim no authority to order the City to house people in the Tombs.

I simply want to set the record straight, and I am instructing Mr. Tobias or whoever is the senior member of the legal staff here please to bring to the Commissioner's attention my remarks, and my keen disappointment at having been so misrepresented.

Now, gentlemen, the questions that I would like to go into this afternoon are as follows:

First, as to recreation, how much additional manpower is it estimated would be required by the use of the yards in the winter, and if there were to be the same or more recreation over the weekends?

When I say the same, I mean the same as there is on the weekdays.

Let me interpose, before I go on to my other questions, to indicate that my asking these questions does not indicate any particular penchant with regard to a ruling. I simply want to have this information at my hand before I make a ruling.

Second, as to visiting, how much additional

manpower would be necessitated by adding a weekend visiting schedule for the MDM comparable to the visiting schedule that takes place during the week?

Next, what are the reasons for the present limitations on children's visits which, as I understand it, can take place only once a week?

As to optional lock-in, first, is there any reason besides the existence of programs, for refusing to institute optional lock-in except in the evening after meals?

Second, I would appreciate an explanation as to the interrelationship between the feeding process on the cell blocks and the reason for locking in the side that is not eating. I think I understand the reason but I am not certain and I'd like it to be clarified.

Third, would there be a need for additional manpower if the optional lock-in were instituted for the hours during which inmates are locked out of their cells?

I state those questions for the record.

I understand from my law clerk that she has communicated or has tried to communicate to counsel that these are the subjects I wanted to go into.

MR. TOBIAS: I believe the last question comes as somewhat of a surprise to the defendants. Will you please repeat it?

THE COURT: Would there be a need for additional manpower if optional lock-in were instituted for the hours during which inmates are locked out of their cells?

MR. TOBIAS: Thank you.

THE COURT: I suppose that at least on all these questions except perhaps the visiting one, Warden Thomas would be the most knowledgeable witness, but it is up to you, Mr. Tobias, how you wish to put this information before me.

MR. TOBIAS: All right. I suppose we will first call Warden Thomas.

..

JAMES A. THOMAS, called as a witness, in behalf of the defendant, resumed:

THE COURT: You don't need to be sworn.

Both of these gentlemen have been sworn before in this proceeding.

Warden, I would be happy if you can answer my questions as succinctly as possible. I don't want to take any more of your time or my own than is necessary and I hope they are questions you understand.

THE WITNESS: Yes, your Honor.

THE COURT: May I just start?

MR. TOBIAS: Sure, your Honor.

THE COURT: The first question is how much additional manpower you estimate that you would need by the use of the yards in the winter? That, of course, depends on how many days they'd be used.

Let's say first on a five-day schedule, and, secondly, on a six or seven-day schedule.

THE WITNESS: Well, your Honor, we had-- during the summer months we have a program whereby they go out four times a week.

THE COURT: Yes.

THE WITNESS: Now, that would necessitate the additional four officers each day.

THE COURT: I am not quite clear.

Do you mean each day that they go out you have to have four officers?

THE WITNESS: Four additional officers.

THE COURT: All right. So really the answer is four additional officers per day?

THE WITNESS: That's right.

THE COURT: And for how many hours?

THE WITNESS: The working time would be approximately about six hours that I would use them for that purpose.

THE COURT: Right. And I suppose if you had

people for six hours, you would use them for a couple of hours for something else, but in any event, you'd have to have them as full-time employees?

THE WITNESS: That is correct.

THE COURT: Are there any questions that anybody wants to ask the warden on that?

That is the information I wanted. It satisfies me.

Are you satisfied with the answer?

MR. TOBIAS: Yes.

THE COURT: All right.

The next question, and I am sure maybe you want Warden Buono to back you up on this or testify in addition, but from the point of view of the MDM as distinct from Warden Buono's office, it has to do with visiting.

How much additional manpower do you think that you'd have to put on at MDM if there were visits for the same number of hours on Saturday and Sunday as there are on weekdays?

THE WITNESS: Well, I would need seven correction officers that day.

THE COURT: How long would each of them have to serve?

THE WITNESS: They would work approximately --

almost seven hours.

THE COURT: So again we are talking about full time?

THE WITNESS: That is correct.

THE COURT: I am satisfied with that answer.

MR. TOBIAS: Your Honor, there is something I think the Court should be made aware of.

Since last week we have had another conference on this matter, and we have decided to again revise the visitation schedule.

The visitation schedule would allow visitation on both Saturdays and Sundays during the day hours.

In addition, there would be day visiting on the hours that were brought to your attention during the trial we had Thursday and Friday.

In addition, there would be children's visits on Monday night.

THE COURT: Let me see if I got this straight. In other words --

MR. TOBIAS: This has the important effect, I think, of opening up a weekend visit to everybody once a week rather than once every other week.

THE COURT: I understand that, and am I to understand that even though this visiting schedule would cover

Saturday and Sunday, an inmate could only receive a visit on either Saturday or Sunday?

MR. TOBIAS: Correct, your Honor, it would be alternating. He would receive a visit on this Saturday and then he would be eligible to receive it on next Sunday.

THE COURT: I see.

Just let me take some notes on this.

Now, as I understand this proposal, there would still be visits only five days a week but two of the five days would be Saturday and Sunday?

THE WITNESS: That is correct.

THE COURT: That is the major alteration?

THE WITNESS: That is correct.

THE COURT: Instead of being on Monday and Tuesday it would be Saturday and Sunday?

THE WITNESS: And the six days for those that have children.

THE COURT: Yes.

MR. TOBIAS: I think there are certain other facts that may be relevant here.

Are you finished with the area of visitor yard recreation?

THE COURT: I am finished with the only question

I have it on my agenda, yes.

MR. TOBIAS: I think you mentioned something about winter recreation period during the weekend?

THE COURT: Yes, that is correct, I did, and I didn't ask the question on that.

I think the question really is answered by the answer the warden gave or at least let me explain my thinking.

THE WITNESS: There is something else to that. It is true I would need the same four officers on Saturday and Sunday or holiday, but there is an important difference.

During the weekdays, or just to give you an example, I have 96 officers on a weekday where I only have 41 on a Saturday and Sunday.

THE COURT: Yes?

THE WITNESS: This is less than half the force. Now while you are having these yards, you would have four of these running simultaneously. If an escape occurred, I would be in awful shape because I haven't got the help and the supportive force present.

That is not only for my institution, it is for all the institutions; we are down to a skeleton force on Saturday and Sunday.

THE COURT: All right. I understand, and that

certainly is relevant.

MR. TOBIAS: Can I ask another question?

THE COURT: Sure.

DIRECT EXAMINATION

BY MR. TOBIAS:

Q To follow this up, Warden, when your institution gives these outdoor yard recreation periods, do you depend on Warden Buono's force for this back-up strength?

A Yes. Yes.

Judge, we would have-- Rikers is fortunate in some ways and in some ways we are not but we are very,very fortunate in that I have-- I can draw from Warden Buono. For instance, yesterday I had a disturbance in 1-A, Administrative Section, that is, not the bunch-- that is not Giamperrozzi, that's the ones above. And we had officers standing by.

I am very glad to report that no force was used, everything was a matter of talking for a couple of hours and we got them back and everything was all right.

But in the meantime, we have sufficient force there to draw on it if we have an emergency whereas one Sunday we had a riot there, and it took us at least two and a half hours to get sufficient force to even do anything, or even think about doing anything, because we just

simply didn't have the manpower there at that time.

THE COURT: All right.

MR. TOBIAS: Your Honor, I think something else may be relevant here regarding weekend visitation.

Q Warden, do you have any figures relating to the volume of visitation that you get on weekends?

A Yes. It is very heavy on weekends for the simple reason that we get about 160 visits.

THE COURT: I would expect it to be heavy weekends.

THE WITNESS: That is right.

Q How does that compare to a weekday?

A It is just-- it is not too much different but the point of it is we are only going from half the alphabet to get this amount. We are not-- weekdays, now, there is no alphabet restriction.

THE COURT: So per inmate it is twice as much?

THE WITNESS: That is correct.

THE COURT: Approximately?

THE WITNESS: Approximately.

THE COURT: All right.

I will go on to the next question then.

The next question, Warden, is, what the reasons are for the present and even the proposed limitation on

children's visits? Why only once a week?

THE WITNESS: For this reason: We average around 35 visitors for a Monday night for two institutions; for both my institution and the Adolescent Reception.

THE COURT: 35, you say?

THE WITNESS: 35. So we don't get very many. It is no problem to have them every day, with one notable exception.

The crowded buses, the crowded Bridge site building, the fact that a woman with a child would have to wait her turn and sometimes the wait is considerable, the loss of dignity because we do have incidents where in Warden Buono's area we have to arrest people for profanity, drinking and whatnot.

The visits for the children at night is a very dignified affair. There is no delay.

THE COURT: Are you distinguishing between night and day?

THE WITNESS: Well, the visits, all of the visits, for all the institutions on Rikers Island for children are held at night.

THE COURT: I know, but I am asking, maybe we can start anew. I can understand that what you have said has to do with the fact that you believe it is a better

time for women to bring children at that time than during the day? Thatis what you are saying?

THE WITNESS: That's right.

THE COURT: I am saying why couldn't they do it three, four, five nights a week?

THE WITNESS: Well, the visit, my visiting house is used by the other institutions at night.

See, when I complete my visits, hopefully at four o'clock, at 4:30, quarter to five--

THE COURT; What time do your children's visits occur?

THE WITNESS: Children's visits occur at night but they occur for everybody. The two institutions use the visiting house on the other days.

THE COURT: When you say the two, which two?

THE WITNESS: This is the Adolescent--

THE COURT: The women?

THE WITNESS: No, the Adolescent Detention Center.

THE COURT: You mean yours and the other one?

THE WITNESS: That is correct. I have them in the afternoon, they have the visits at night. This is on Tuesday, Tuesday, Thursday and Friday. But on Monday night, both institutions have the visits for the children at the same time.

THE COURT: Are you telling me, although I realize this may be more in Warden Buono's province than yours, that the what-do-we-call them, the clearance house? --

THE WITNESS: That's right the bridge site.

THE COURT: That the bridge site is occupied other nights and therefore you can't use it for your children's visits?

THE WITNESS: Yes, sir, it is occupied at night. I am the only institution that has visits-- no, the Rikers Island Hospital and I are the only institutions that have visits during the day during weekdays.

All the other institutions have their visits at night.

THE COURT: And the only space for the use of the bridge site, the only time for the use of the bridge site at night that is available is Monday, is that right?

THE WITNESS: That is correct.

THE COURT: Is that the way you understand it, Mr. Tobias.

MR. TOBIAS: I don't think so, your Honor.

THE WITNESS: No, I am saying to you, numerically, from the amount that's involved, I would have no problem for them during any day. I am only saying that it would be much more dignified letting it remain the way it is

because if they came during the day, they would have to take the bus -- you must understand -- the bus arrives on the other side to bring them over -- there is a lot of pushing and shoving and jostling to get onto that bus at first.

THE COURT: And there are less people at night, you mean?

THE WITNESS: There are less people on Monday night because we only handle children for all of the five institutions on Monday night.

THE COURT: All right, putting it a different way, you are saying that you think it is best to have children's visits when there are not anybody but mothers and children, is that right?

THE WITNESS: There's more decorum, safer, everything.

THE COURT: And if you are only going to do it when there are only mothers and children, you can't obviously do that every single day because then nobody else could visit?

THE WITNESS: That's right.

THE COURT: Have I got it right now?

THE WITNESS: That's correct.

THE COURT: Let me make note of that.

THE WITNESS: I hate to say this but, you see, if

the woman comes in, they come in and they are given priority just the way that they come and arrive. Now, most people might defer for a woman and child. You are going to get someone that that don't want to defer and say, "I was here first, I don't give a rap" so the -- and that the woman and the baby has to stay and wait for the second or the third visit.

THE COURT: In other words, there is a special logistical problem, if I understand you, at Rikers, which does not exist at other institutions, at other institutions on the mainland, let's call it, like the Tombs or Bronx House of Detention or whatever it is?

THE WITNESS: That's right.

THE COURT: The visit by a mother or a child isn't going to interfere with somebody else's visiting?

THE WITNESS: Well, I don't know what their experiences are, you see, but I know that they don't handle the volume of visits, for instance, that we handle on Rikers Island; and if they came every night there, where Warden Bond can testify to the total amount of people that are involved.

THE COURT: But the only thing that is special about Rikers Island-- well, there are several things that are special but the key thing that you have mentioned is

the problem of getting to the clearance house?

THE WITNESS: That's right.

THE COURT: Once you are there it is not so different from any place else except that you have to go through two places instead of one?

THE WITNESS: That's right.

THE COURT: Therefore I am trying to narrow down the issues; for example, the Tombs, as I recall it, there wasn't any limit to the number of times the children could come. They could come any time, any time anybody else could come?

THE WITNESS: That's right.

THE COURT: And if I understand you, the reason you feel that this wouldn't be appropriate at Rikers Island is because at Rikers Island you have this transportation problem of pushing and shoving, waiting, and so forth?

THE WITNESS: That's right.

THE COURT: Which you don't have at the Tombs?

THE WITNESS: That is correct.

THE COURT: At the Tombs you take the subway and walk in the door?

THE WITNESS: That is correct.

And don't forget, when this started, when they

were doing this in the Tombs, they had a top census, I think, of 500 trial men, too.

THE COURT: That is a manpower question but I realize, of course, the more visits or the more people you have, the more visiting --

THE WITNESS: The more waiting time.

THE COURT: The more waiting exists but I am trying to isolate these factors.

All right.

Are you satisfied on that point, Mr. Tobias?

MR. TOBIAS: Yes, of course, your Honor.

Of course, Warden Bueno will be speaking to this also.

THE COURT: Now I am coming to the question of optional lock-in-- and just to be sure we all understand each other's terminology, because sometimes I get confused by the use of these terms myself and I use them differently, by optional lock-in, I mean the right of a man to say, "I would like to be locked in my cell even though everybody is out."

THE WITNESS: That is correct.

THE COURT: The first question is there any reason [illegible] for the existence of [illegible], for refusing an optional lock-in, except at the times when you have one --

I know you have one-- but for refusing lock-in at other times, am I correct in believing, as I did conclude from the transcript, that the exclusive reason for refusing more optional lock-in, is that you have got these programs going on during the day?

THE WITNESS: This is a major factor but there are a couple of others that I can mention to you.

THE COURT: All right.

THE WITNESS: In the event that we have any sort of trouble and feeding is always a sensitive thing, and we have to lock-in, and the feeding takes place simultaneously in all of the cell blocks, I only have half of my population out.

Now if I have to lock-in, it takes twice as much time to lock-in the whole thing.

In addition to that, in addition to that, you have the question of if all of them are out, for instance, the [illegible] is located on the B side, if you have the inmates on the B side out, and the A side crosses over--

MR. TOBIAS: Your Honor, I think the warden is jumping the gun. I think he is answering your next question.

THE COURT: If they are interrelated I don't mind

MR. TOBIAS: They are really not, your Honor. I think -

MR. BERGER: Your Honor, we would like to hear what Warden Thomas was going to say.

MR. TOBIAS: I think he is addressing himself to the problem of lock-out hours and the day room.

THE COURT: Let's start again to be sure that everybody understands each other.

I know that you allow a certain amount of optional lock-in. Right?

THE WITNESS: That is correct.

THE COURT: And I know or at least I conclude from the record as I looked it over after the last hearing, that the reason for your not allowing more optional lock-in time is that there are various programs going on.

THE WITNESS: That is correct.

THE COURT: And there was a relationship in your mind between that fact and the other?

THE WITNESS: That is the major reason.

THE COURT: I wanted to know, let's suppose they had no programs, for example. I am not suggesting you should have no programs, because I think that's good, but suppose there were no programs, are there any other problems that would stand in the way of additional lock-in?

Lock-in, and you.

THE WITNESS: Well, the proof of the pudding is when there is no programs, I do have it. I do have the visit and lock-in at night and on Saturday, Sundays and holidays. I presently have it.

THE COURT: Then I guess I have to ask you a little further.

I really don't understand what the problem is that it causes you not to allow somebody an optional lock-in during the hours in which programs take place.

THE WITNESS: Well, let me explain to you. If you have -- we have to come down, I don't have a -- I have two officers to pick up the visits, I have one officer to pick up barbershop, one officer to pick up law library,one officer to pick up counsel, and whatnot.

Now, all of these officers are competing to try to get inmates out of the cell block. They have to go to, at the present time, six different areas, seven different areas at the present time, and pick up.

any delay in getting anybody out --

THE COURT: For a visit, we are talking about?

THE WITNESS: For a visit. It accumulates. If the man is down locked-in and they come to get this man and you have to go down and go up the three flights of stairs

and that him asleep, wake him up, he becomes angry or something like that, all of these things are delays.

THE COURT: So really what you are saying, and I am not minimizing it, I just want to be sure I understand it, what you are saying is that it takes longer to find a man and put him in presentable condition for a visit if he is locked in his cell than if he is at the art class or gym or whatever?

THE WITNESS: Well, no, what I am saying, the same thing holds true for any of these things.

Now, if you had true optional lock-up, what you are talking about --

THE COURT: Lock-in.

THE WITNESS: Optional lock-in; you would get people that would not initially want to come out of the cell when you blew the whistle.

Now, you got to have them ready for the different programs. It is exceedingly difficult because some of the programs, some things are popular and some things are not; for instance, we have to get people ready, we have to give them a medical examination to determine their fitness to be transferred to Ossining Correctional facility. Some of them don't like to go there. Some of them won't answer their names.

THE COURT: I wouldn't consider that to be the condition on which lock-in would operate if it did operate, and I don't know whether it operates that way or not.

I don't think it is inconsistent with an optional lock-in plan to require that at a certain time everybody stand outside his cell or whatever it is you'd like them to do in case somebody has to go to the doctor or this, that and the other.

I am not suggesting, and I don't understand the plaintiffs to suggest, and I want to be corrected if the plaintiffs do suggest, that anybody is to be permitted to avoid a legitimate order by saying "I'd like to lock myself in my cell."

I don't see a problem there.

Let me be sure I understand. Let's suppose that three women come to visit at the same time.

THE WITNESS: Right.

THE COURT: And the husband of one is at the art class, and the husband of another is in the gym --

THE WITNESS: Right.

THE COURT: And the husband of a third, under the assumptions we are making, is locked in his cell.

THE WITNESS: Right.

THE COURT: In your opinion, would there be any

appreciable greater time required for the correction officer who goes to get the man locked in his cell than the other two men?

THE WITNESS: No, but it would be added because you might find, from taking your example, you might find two locked in the cell in 6, you might find two in 4-block, 5-block, and like that.

THE COURT: Sure.

THE WITNESS: Now the accumulation --

THE COURT: Usually don't you send correction officers one by one to get a man?

THE WITNESS: What I am saying to you, I only have two officers.

THE COURT: What I don't understand is this: Even if you only have two officers, how does it impose more of a burden to look for a man in that particular spot than in this particular spot? I mean a man might be almost in a lot of different places during the program time, isn't that right?

THE WITNESS: That's true.

THE COURT: And nobody is absolutely sure in advance where he is in the sense that they have to look and see where he is.

THE WITNESS: That is correct.

THE COURT: All right, then I think we understand each other.

MR. TOBIAS: May I ask a few more questions?

THE COURT: Surely.

BY MR. TOBIAS:

Q Warden Thomas, what are the services that are offered by the institution during these business hours?

A Well, you have clinic, you have visits, gym in the afternoon, you have legal library all day, you have library, you have got counsel visits, barbershop, commissary, school--

Q Warden --

THE COURT: Are you saying that all these activities overlap visiting time?

THE WITNESS: Yes, sir.

Q So I take it the inmates who are eligible to participate in these things or to be serviced in these areas have to be taken to these areas by your correctional personnel?

A That is correct.

Q I take it then it would delay the process --

MR. HERMAN: Objection, your Honor, he is putting words in his mouth.

THE COURT: Warden Thomas is sophisticated enough.

Q I would like to know, can you characterize whether

this option I lock-up would impose any impediment to the programs?

A I think it would slow it up. This is the reason I denied it in the first place. That was the only and sole reason that I denied it.

Q So when we say programs, I take it you include all the services and all the facilities offered by the institution?

A Yes.

THE COURT: I didn't mean to restrict it to the art classes.

That brings us to the next one which is, why is it that the side that is not eating in a cell block is locked in when the other side is eating?

THE WITNESS: Because if, as I was saying--

THE COURT: I think I understand the answer but I would like to get it straight.

THE WITNESS: For instance, the mess hall is on the B side. There is no mess hall on the A side. Therefore the A side must cross over to the B side. If the B side is out we got great difficulty in preventing them from going in for a second meal or going in and have a meal with the A side and later going in with the B side.

In addition to that, as I stated before, feeding

is a very, very sensitive time in the institution. I am feeding two in seven different areas simultaneously.

THE COURT: Right.

THE WITNESS: Now, should any emergency arise at all at this particular time, I could very easily, it is much easier for me to look in the half that's out than it would be for me to look in the entire, and you get more disturbances at this particular time than you would do at any other time.

You get disputes between inmates that are serving the food and inmates that are receiving it, and different things of this sort, complaints about the food, et cetera, et cetera.

THE COURT: All right.

The next and last question I think is --

MR. TOBIAS: Your Honor, just a couple of things on this.

THE COURT: All right.

MR. TOBIAS: I want to make sure the Court understands. I have a very, very rough sketch of the block area here, and I just want to perhaps give the warden an opportunity to explain the construction to the Court.

THE COURT: I think I understood it but if there is anything -- you want to come up --

MR. TOBIAS: We can come up with a more sophisticated diagream here.

THE WITNESS: Here's the cell block where you come in. This is the dayroom here. These inmates from this area here must cross over the stairs and go into here (indicating).

If you have all these inmates out here, you have got certain problems involved because your shower room is over here and whatnot.

Now you have got them crossing each other, and you got a certain degree of confusion.

THE COURT: I see that argument with regard to the A people coming over while the B are eating or rather vice versa, leaving these people out while the A come over to eat.

Now, with the B people eating why can't the A people be left out?

THE WITNESS: All right, but the point is -- I don't know if you understand that we alternate.

THE COURT: Yes, I do; you mean in eating?

THE WITNESS: Yes. We alternate the eating. I will tell you why, because whoever eats last, as we come down to the end of the feeding, if there is food left, get a little bit more of the food. You follow me?

THE COURT: Yes.

You mean you alternate the order in which the sides eat?

THE WITNESS: That is correct.

THE COURT: All right. Go on.

THE WITNESS: If we feed this side, which let's take in the what-do-you-call it, in the evening, the last side that we fee we don't lock them back in. They stay out.

Instead of that we go over and unlock the other side.

THE COURT: That's good but I don't know that that answers my question entirely. Let's forget the evening for the moment and take the middle of the day.

THE WITNESS: Okay.

THE COURT: If I understand it correctly, when the B side is eating lunch, the A side is locked in?

THE WITNESS: That is correct.

THE COURT: Why is that necessary?

THE WITNESS: Well, for the same reason that I told you before.

THE COURT: No. What you told me before, and I understand it all right-- I think I do -- is that when the A side is eating, and comes over into B territory, so to speak

you want to keep the B people out of the way?

THE WITNESS: That is correct.

THE COURT: But if the B side is eating, the A side would still be kept on its side of the block but not locked in, couldn't it?

THE WITNESS: Yes, but if I understand you straight, this would wind up with an uneven amount of time out, wouldn't it?

THE COURT: It might but is that the problem?

THE WITNESS: Well, now,you see, the inmates, they want equity complete.

THE COURT: And they particularly want equality whether it is equity or not.

THE WITNESS: That's right.

THE COURT: But that is the reason for the A side.

THE WITNESS: Yes.

THE COURT: All right, there is only one more I think I have.

There are certain times when people are locked out of their cells?

THE WITNESS: That is correct.

THE COURT: Called lock-out time or whatever it is called.

THE WITNESS: That is correct.

THE COURT: I understand some of the problems that you have mentioned with regard to optional lock-in, at times that does not exist?

THE WITNESS: Right.

THE COURT: But the specific question I want to ask now is whether you would need to have more manpower to administer an optional lock-in system, or whether it is just this question of delay and so on?

THE WITNESS: Well, it is just a question of delay because we come to something, the optional lock-in in the daytime is a matter of --- on the eight to four shift, is a matter of four hours.

Now, if I have --

THE COURT: Incidentally, I can't remember how the system for locking yourself operates. Is it individual locks?

THE WITNESS: No, sir, it is mechanically operated. It is hand-mechanically operated, but you can open all the entire tier.

THE COURT: How do you open and close it or lock and unlock the cells on the optional lock-in? I take it everybody knows if they want to be locked in at that time they have to be ready to go into their cell at a certain time and they lock in; is that right?

THE WITNESS: They blow the whistle and tell them "Optional lock-in." They go and stand in front of their cells.

THE COURT: Then the doors are unlocked and they go in and then they are locked in?

THE WITNESS: Well, the correct way is where the officer can set the keys so only those cells are opened.

THE COURT: He can?

THE WITNESS: He can set the key. That is the correct way and that is the way the order reads.

A lot of times it is much easier to open them all up.

THE COURT: As far as the man is concerned, what happens is the whistle is blown, he stands in front of his cell door, if you want to call it that, the bars are unlocked, he goes in, and then they are locked?

THE WITNESS: That is correct. We don't leave any cell open.

THE COURT: Obviously it wouldn't be any harder to do that any other time than it is to do it when it is done. It wouldn't take any more of an operation at eight o'clock at night or three o'clock in the morning, or it doesn't make any difference when it is done, that is the way it would be done, right?

THE WITNESS: That's right, but you are not suggesting it be done at those hours?

THE COURT: No, I just meant that the system does not depend on the fact that it is -- I forget when your present optional lock-out takes place; in the evening, is that correct?

THE WITNESS: That is correct.

THE COURT: So to be realistic about it, if it were to be done at eleven o'clock in the morning, although that may not be a good time to choose either, you would do it the same way?

THE WITNESS: We'd do it the same way.

THE COURT: I think those are all the questions I have of the warden.

Do you have any more questions, Mr. Tobias?

MR. TOBIAS: No, your Honor.

THE COURT: Do the plaintiffs' counsel want to ask any questions?

MR. BERGER: Yes, your Honor. Just a few questions to clarify.

CROSS-EXAMINATION

BY MR. BERGER:

Q You stated that the visiting schedule is going to be changed on weekends and that each inmate will get a

visit, will be permitted a visit either on Saturday or Sunday of every week, is that correct?

A That is correct.

Q What will be the visiting hours for each day?

THE COURT: You mean the weekday?

Q Each weekend day.

A I think it is eleven o'clock in the morning.

Q Eleven until when?

A Until we complete. This is really what -- it is eleven -- excuse me a minute -- it is now ten to one. In other words, meaning that anybody who comes before one o'clock is guaranteed to get the visit.

Q Anyone that gets to the bridge control point by one o'clock is guaranteed?

A That is correct.

THE COURT: On the new one it will be eleven or ten?

THE WITNESS: No, it will be ten o'clock.

THE COURT: Ten o'clock to one.

THE WITNESS: Ten to one.

Q The Wednesday, Thursday and Friday visiting, that will be the same hours as before?

A That is correct.

Q That is eleven to two, is that correct?

A No, it is ten to one now.

Q Was it recently changed from eleven to two, to ten to one?

A Yes, it was changed because when we eliminated the alphabet, the amount of visits increased to the point where I was going past my count time, and this--

THE COURT: I understand it's been changed.

Now which is it going to be from hereon, ten to one?

THE WITNESS: Ten to one.

Q Do you anticipate, as a result of this expansion of weekend visiting, that there will be more visitors on week-ends?

A Well, you mean do I expect there will be more on Saturday and Sunday?

Q More on Saturday than you have at present, more on Sunday than you have at present?

A No. Well, we don't have any on Saturday for the trial inmates at present.

Q I see.

A Now we are giving it to them on Saturday.

Q I see.

The question I was actually coming to is, do you anticipate assigning any additional officers to operate

the visiting system as a result of this change in the schedule?

A Well, I will have to assign officers on Saturday.

Q How many are going to be assigned?

A Seven.

THE COURT: Let me ask you this: I don't know if it makes any difference in the matter that's before me but just as a matter of curiosity as to how these things work; if you don't have visitors on Monday, for example, will you simply shift the days on which certain correction officers work? Is that it?

THE WITNESS: Well, we were having visits Tuesday, Wednesday, Thursday, Friday and Sunday, which is five days. Now, of course, to operate the children's visits does not require as many officers involved, but on these other days it requires seven correction officers.

By eliminating Tuesdays, I will not need any additional manpower.

THE COURT: Right.

THE WITNESS: Tuesday's manpower will be allocated to Saturday.

Q I see.

THE COURT: Do you have an overtime problem? Do your correction officers get automatic overtime for working

on Saturday or Sunday?

THE WITNESS: If I don't have sufficient,yes, but we are--

THE COURT: Not if it is their regular hours?

THE WITNESS: Not if it is their regular time, no, no.

Q On Monday nights, you have visits for detainees for both MDM and ADC running simultaneously, is that correct?

A That is correct.

Q Running in the same facility?

A That is correct.

Q This is the only occasion on which MDM and ADC have visits at the same time, is that correct?

A That is correct.

THE COURT: That is the children's visits?

THE WITNESS: That is correct.

Q If a person comes to visit a detainee and the detainee does not want to be visited, is the detainee required to go down to the visiting area?

A No, we don't force them.

Q If a detainee signs up for one of the programs and he decides one day he does not want to go, is he required to go?

A No.

Q If a detainee, inthe hours when a particular block can use the library, does not choose to go, he does not have to go, does he?

A No.

Q During the commissary hours, if he wants to skip commissary, he does not have to go?

THE COURT: I get the point, they are not forced to go anywhere?

THE WITNESS: They are not forced to go anywhere except if they are being transferred out of the institution for some reason or other, then he has to go.

THE COURT: Sure, but he is not forced to attend any activity in the institution?

THE WITNESS: No, sir.

MR. BERGER: That's all, your Honor.

THE COURT: Thank you.

Thank you very much, Warden.

MR. TOBIAS: Your Honor, I just have one further question.

REDIRECT EXAMINATION

BY MR. TOBIAS:

Q Warden, during the lock-out periods, if a man is scheduled to go to an institutional service such as library or clinic et cetera, I take it there is a loudspeaker, that

an officer or somebody who calls out the man's name or the fact that he is scheduled to go, is that not correct?

A That's right.

Q If these people were locked in on an optional basis during the times when all these things were in operation, would a correction officer have to go up and get the man individually?

A Yes, he would.

Q How many correction officers supervise the tiers?

A I have at present in the cell blocks,a regular population cell block, I have four correction officers.

THE COURT: Let me pursue this. If I understand it correctly, as it now is, with no optional lock-in at that time, the people are all down on the flats?

THE WITNESS: That's right.

THE COURT: All right.

Now what would happen if five minutes before activities, let's say you got fifty men that are -- say you had an optional lock-in and you had fifty men optionally locked in, wouldn't it be feasible, five minutes,let's say, before the activity was to begin or five minutes before you now do whatever you do--let me go back a little bit.

At the present time, let's say an activity starts at what, eleven o'clock?

THE WITNESS: Ys. Nine o'clock in the morning.

THE COURT: All right, nine o'clock.

The correction officer blows a whistle, does he, or what does he do?

THE WITNESS: That's right.

THE COURT: And I guess there are different places to line up for different activities?

THE WITNESS: Well, here's the thing. The inmates know that they are coming to pick them up for clinic. They know when it is their commissary day. They know when they are scheduled to go to school.

THE COURT: They are standing there in the entrance?

THE WITNESS: They are standing somewhere near the front anticipating that they are going to go.

THE COURT: What happens when the whistle blows?

THE WITNESS: They call, for instance, for commissary. They let them out of the gate and count them out.

THE COURT: All right.

Now I don't understand the assumption of your question, Mr. Tobias. I am talking about as I see optional lock-in, at that time a man, instead of going to commissary, would in effect stay, somehow or other, or either by word or by actions, "I want to stay in my cell at this time."

We are assuming they are already out of their

cells, is that right?

MR.TOBIAS: No, your Honor, that is just the point. All these things, all these services have been during the business hours at some point. It is not always at a designated point in the day. In other words, all of a sudden the clinic may request somebody; or the library may send down a slip saying, "We can now accommodate Joe Jones, we can accept him to use the library."

THE COURT: You are talking about individual summoning?

MR.TOBIAS: Sure, a lot of these are individual.

THE WITNESS: Now, you take the visits, this is a constant thing going back to the visiting periods.

THE COURT: I understand about the visits. Visits have to be on an individual basis no matter what you do. That's true. Right?

THE WITNESS: Right.

Let's take commissary. When it is time to take commissary, you may, out of a cell block holding 300 inmates, you get 200 that are going down to purchase commissary. This means that the men are constantly coming back and forth to take them up. We can't take 200 down at the same time.

I mentioned -- let's take the clinic. They don't pick them all up simultaneously. Sometimes there's too many

to go.

THE COURT: Then let me take another tack.

I am not necessarily out to try and accomplish this. I am just trying to find out what the obstacles are.

Supposing it were understood that if a man chose to be locked in between nine and ten, or whatever hours it is we are talking about, he just wouldn't be called for anything. If he was interested in going to the library, that is tough, he couldn't go to the library that day even if there was an opening, couldn't go to commissary at that time even if there was room for him.

A They will sue out a writ to you that they must.

THE COURT: They won't sue out a writ if the relief were granted to them on that condition.

What I am saying is there would be no legal basis for complaint. That I say as a matter of law.

THE WITNESS: We come to good faith. We come to -- certainly we would, supposing that we did this, we do have instances where the guy wants to see the movie or he wants to go to the gym instead of going to the clinic. He goes out and he does whatever he wants to do, and afterwards, he says, "You didn't call my name. I didn't hear it, I didn't get to go to clinic." Right? These are some of the

problems that you get.

THE COURT: As I see the request for lock-in, the only reasonable condition on which it could be granted would be it, in the event a man chose to be locked in, he gave up the right to do anything else during that period of time.

MR. BERGER: That is correct, your Honor. That is exactly plaintiff's position. With the exception of the visits. If a visitor comes --

THE COURT: Well, a visit is something else. I am just curious --

MR. TOBIAS: It is a misconception, your Honor.

THE COURT: He is talking about the position of the plaintiffs.

MR. TOBIAS: Even if that was the case, I think it would be reasonable for us to argue it simply couldn't be done this way. It would simply delay the visitation procedure too long.

THE WITNESS: There are some things. For instance, may I say this? Counsel comes up, we don't know when they are going to come up, for instance --oftttimes we get a Court order to produce a person later in court, and whatnot.

Now, certainly these things - - well, he doesn't

have to see the attorney if he doesn't want to. But on the going to court, this is not something that is optional. He has to do it.

THE COURT: But you'd have to do that no matter where he was, wouldn't you? If you got an order to produce somebody in court and the man is in the-- well, you don't happen to have a shop, do you-- but, well, the art place, which sticks in my mind because I thought the work was good there, but if he was there, you would still have to send somebody to go and get him, wouldn't you?

THE WITNESS: Yes. But if I understand Mr.Berger, we are going to have some kind of thing that they are going to sign waiving their right to go to all of these places?

THE COURT: No, it would be this; if it existed it would be as follows:

It would be that the Court, if it granted this relief, would grant this relief only on the condition that whoever said "I want to lock-in my cell," gave up the right to do anything else during that period of time except, of course, the things that you order him to do.

I mean, if he is ordered to go to court, he can't say, "I don't want to go to court because I am locked in my cell."

THE WITNESS: I want to point out something else,

too. Maybe I can't explain myself but there are a lot of administrative difficulties here.

This was never designed to just limit their -- why would I limit it on the weekday when I grant it on Saturday, Sunday, and holidays? The whole thing is, and which I have tried to explain to some of the inmates, this is to their benefit because they get to their services earlier and quicker and more expeditiously this way than being locked in, and most of them understand that. I am quite sure of it.

Now you get some of them that they want this particular privilege. I have no great feeling about not granting it to them. But there is going to be difficulties about it. There is going to be arguments that "I didn't want to lock-in." You follow me? And "You should have locked me out," and all of these things are going to come up. And this was why, we, at the time, this was why I made the arbitrary ruling that they would be out during the program times.

THE COURT: All right. The only other question, Mr. Tobias, --

MR. TOBIAS: Just one other thing on this point, your honor.

BY MR. TOBIAS:

Q In order to get an inmate to a particular service or to inform an inmate about a particular service, would it not be necessary to go up to the cell if the inmate was locked in during his period?

THE COURT: What do you mean "to inform him about a service," for example?

Q How would the correction officer know when the inmate wanted to go?

THE COURT: To go where?

MR.TOBIAS: To a particular service.

THE COURT: I can see very easily. Blow a whistle and say, "Everybody who wants to go to commissary get over here. Everybody who wants to lock-in go up to their cells now."

MR. TOBIAS: If this took place during a lock-in period, as these services often do, would it not require a correction officer to go up?

THE WITNESS: No, he is saying it would be stipulated that they will not go to the services.

THE COURT: That's right, they can't have it both ways.

THE WITNESS: Now the way that -- they know that the services because it comes up over the loudspeaker system,

"On the clinic." "On the library." Or whatnot.

So he could hear it in his cell.

What you are getting at is over all the din and noise, if he was in the cell, attracting the attention of the correction officer; other than that, the correction officer, and I only got one on the side, he would have to go all the way around and make the round of all of those tiers.

THE COURT: I wouldn't consider it is the obligation to do that.

Another way to do it, of course,would be if the very first thing, before you call the activity, or whatever you want to,say, "Everybody who wants to lock-in, go up to their cells. but no activity."

THE WITNESS: That's right.

THE COURT: Then they are in there and then you say,"okay, commissary, library,"and so on.

All right.

THE WITNESS: I am not happy with it, Judge,but--

THE COURT: Yes, and I haven't finally concluded but I want to find out what is possible.

BY MR. TOBIAS:

Q Warden, presently when a correction officer wants to call an inmate for a particular service, how does he do it?

just explain that procedure.

He calls it over the loudspeaker system. The inmate responds. Ofttimes he does not respond and we have to call. We have had people that we had to lock in the whole entire half of the cell block in order to be able to identify them to get them out.

THE COURT: All right.

A It doesn't happen very often but we have been forced to do that because we must have that particular person.

MR. TOBIAS: One other thing, your Honor, with respect to Warden Thomas.

At the last time we convened in this courtroom, there was some question as to the amount of cleaning materials that were distributed on each block, and if your Honor would be interested in receiving this type of information I believe there has been a survey made.

MR. BERGER: Your Honor, I would most strenuously object. We had clients here last time who heard --

THE COURT: Why do it without having the other parties here?

MR. TOBIAS: The Legal Aid would obviously have a chance to cross-examine the warden on these figures but I think that your Honor did indicate that you had some

interest in this, in that you stated that we had not countered certain statements made by the plaintiffs and we, in recognizing this, have in fact made a survey.

THE COURT: Let's leave it, Mr. Tobias. If I consider this to be a critical factor in my determination on the question, I will allow the warden to give me the information or I will allow you to make an offer of proof and see what it reveals.

MR. TOBIAS: Thank you, your Honor.

Do you want to ask Warden Buono a couple of questions?

MR. BERGER: I just have a couple of things.

RECROSS-EXAMINATION

BY MR. BERGER:

Q Warden, isn't it true that the program hours are the same as the lock-out hours?

A Yes.

Q In other words, they are locked out from nine to eleven, right?

A Right.

Q There are classes run from nine to eleven, right?

A Yes.

Q The inmates know the classes begin around the time the lock-out begins?

A That is correct.

Q And the same for the one to three, is that right, in the afternoon?

A That is correct.

Q Also, just with regard to the nine to eleven in the morning lock-out period, there are no visits running at that time, are there?.

A Well, we start now at ten o'clock, you follow me so we will be picking them up about a quarter to eleven.

Q A quarter to eleven?

A That is correct.

Q You anticipate that visitors will be arriving at the institution prior to eleven o'clock?

A Yes, yes. We are getting better and better.

THE COURT: Let's release the warden. I have the information I want. I don't want to string this thing out.

Thank you, Warden.

MR. BERGER: Thank you, Warden.

(Witness excused)

THE COURT: Did you want to call Warden Buono? My request has been satisfied but if you want to call him--

MR. TOBIAS: I think there is some supplementary information that might be helpful.

THE COURT: I take it this is solely on the question

of visiting?

MR. TOBIAS: No, your Honor, on visiting and recreation.

THE COURT: All right.

...

F R A N C I S R. B U O N O, having previously been sworn, resumed:

THE COURT: Are you going to inquire about recreation first?

MR. TOBIAS: Yes.

DIRECT EXAMINATION

BY MR. TOBIAS:

Q Warden Buono, I'd like to know whether or not employees under your command contribute to the back-up force on Rikers Island for the particular institutions and inwhat way they do this, if they do it.

A Well, they are a group of officers that are available to respond under emergency conditions, primarily during the week Monday to Friday.

Q Is this their principal job or what in fact are they really there for?

A No, that is not their principal job because I think earlier I mean the last appearance I made I spelled out the duties of myself and my command, and that dealt with

all of those areas as to production, as to transportation of personnel, the whole thing.

THE COURT: I don't care what they do elsewhere.

THE WITNESS: There are shop operations, they are working on regular--

THE COURT: What you mean is if a riot occurs or something like that, you can swing these people, even a bookkeeper if it comes to that?

THE WITNESS: That is right. They are much more available in terms of the type of work they are doing. I will say this much, I don't know if you are asking for it but I will say that these men are better trained to respond to these kind of unusual occurrences.

THE COURT: Than what?

THE WITNESS: They have been given the type of training, the sensitive type of thing, in other words, not like a bull-in-a-china-shop-type of thing. They have been given specialized training so that they can render assistance.

THE COURT: When you say "better trained," better trained than whom?

THE WITNESS: Than the average officer because these other officers are not available as much as my people are for the specialized training.

Q And, Warden, I take it they perform their regular

duties on a business week, so to speak?

A Yes, as I said, Monday through Friday, weekdays; a day time I should say.

Q Warden, with respect to children's visits, in your opinion as an administrator of an institution, or as somebody who has been associated with these problems for all these years, what type of atmosphere generally prevails during children's visits that in any way makes them different and distinct from regular visitation?

A Well, if I may present to the Court the whole procedure we established as to the juvenile -- we call them juvenile visits -- I think it has a wider range, you know, your Honor.

THE COURT: Yes.

A We did this voluntarily. I sat down with our wardens on the Island and we established a feasible night, and we did this over two years ago, and set up the procedure whereby all institutions would have their children or juvenile visits on that one evening.

We established the hours, and we found that it is a much more conducive type of atmosphere. The environment is different because I think Warden Thomas kind of hit it as well, that you don't have this--

THE COURT: You mean if you make it only children's

visits.

THE WITNESS: Just the children's visits, your Honor, and we don't have this type of attitude where we have unwanted people come in.

I mean I might have to go into a little more explanation but other nights we may have five or six people—

THE COURT: What kind of problems do you have with other nights?

THE WITNESS: Well, for example, if I might go into it, only today one of the many meetings I had was with the Borough Commander of the Queens Police and the representative of the Chief of Operations Office. We made 70 actual arrests last year of unusual occurrences on the bridge site, drunkenness, assaults, exposures, contraband, this type of thing. We have never had that type of problem any single night, your Honor. I think that is a pretty good example of what I mean.

We have many people come in there at night, they are not even supposed to visit. We can't stop them. They come across on the Steinway Transit bus, and it is not until they get off that bus that we have the real screening capabilities, your Honor, and they are told to leave, and if they do not, we have a little bit of a problem.

Now we have these things go on and on continually,

but we have never had this type of problem there at all. It is a smaller group of people. I think some figures were thrown out here before or questions as to what the amounts were.

I'd like to say that on Monday nights, the total amount that we have runs between about 125 to 150, the entire --

THE COURT: Including the mothers?

THE WITNESS: That's the single.

THE COURT: Mothers and children?

THE WITNESS: That's a singular visit. In other words, we call it a single visit. In other words, for double it would be twice that amount.

THE COURT: By the way, I don't remember, is the mother allowed to bring more than one child at a time?

THE WITNESS: Just one.

THE COURT: So it is 250 people?

THE WITNESS: That is right.

WARDEN THOMAS: It is not 250, is it?

THE WITNESS: One mother and one child.

WARDEN THOMAS: When you gave the 125 figure --

THE COURT: It can't be sixty-two and-a-half mothers and children.

WARDEN THOMAS: When you gave 125 or whatever

figure you gave there, you were talking about the mother and child, weren't you?

THE WITNESS: No, that is the whole Island. That is the whole Island.

WARDEN THOMAS: Excuse me, Judge.

THE COURT: What I mean is how many bodies come to visit on a Monday night?

THE WITNESS: That's the figure, your Honor.

THE COURT: 250?

THE WITNESS: About 250.

WARDEN THOMAS: When I gave the 35 figure, your Honor, I was only counting--

THE COURT: I understand. This is for the whole Island.

WARDEN THOMAS: My figure would automatically become 70.

THE COURT: I see. All right. Fine.

THE WITNESS: If we could stay with that for a moment we find that it goes also beyond the control building situation as far as waiting and that type of thing.

Then again they have to, when they get to the individual institution, you don't have that workload that you have normally on a night other than Monday.

THE COURT: Yes.

THE WITNESS: We found this to be a --

THE COURT: Let me ask you this. How many visitors do you have on Monday during the day, average?

THE WITNESS: None. For ACM, none.

THE COURT: Then Tuesday?

THE WITNESS: Tuesday, well the total day would probably run at least 400 individuals.

THE COURT: That is what I mean.

THE WITNESS: Yes, at least 400 individuals. That is, starting at nine o'clock in the morning and going right through to about ten o'clock at night, your Honor, because each of the various institutions have their staggered hour effect.

We went through that, as to what their visiting hours are.

THE COURT: What are the hours on Monday night?

THE WITNESS: We accept them from five through seven.

THE COURT: Which means anybody who gets there by seven gets a visit?

THE WITNESS: Yes, your Honor, and, of course, there is the follow-up time that has to be absorbed by the institutions to process them there.

THE COURT: All right.

Anything else?

MR. TOBIAS: No, your Honor.

THE COURT: Mr. Berger, do you have anything?

CROSS-EXAMINATION

BY MR. BERGER:

Q Warden, most of these arrests and problems you have had at the bridge control area, those have occurred during the evening visits, is that right?

A Some of it in the afternoons, too.

Q Is it more so in the evenings?

A You know, I have never-- I will be very honest with you--

THE COURT: I don't understand that --

A I have never made a survey as to exact times.

THE COURT: I don't understand the warden to be saying it is more necessarily in the evening. It is just in their judgment it is not a good idea to mix kids in with the others, whether it is in the evening or not.

THE WITNESS: Oh,yes. I definitely -- I don't know if I made that clear or not-- I definitely don't recommend it because we have developed something now which is really showing some fruitful effect. As a matter of fact, I think if we took the figures showing the amount of people that we are getting totally, which is available for everyone,

I mean that should be indicated, it should indicate that it is available that night and how many people could come.

THE COURT: If 125 people come, could you accomodate more if you wanted to?

THE WITNESS: It doesn't make any difference. We can accommodate double that amount. It is not a question of the workload as far as we are concerned because we can process the same amount on a Monday night for the juveniles as we do for a Monday night for anyone else.

THE COURT: Anyway, if 125 on the average come, it is a pretty small percentage of the total people on the Island?

THE WITNESS: That's my point, your Honor. I mean it is available for them. I am not questioning --

THE COURT: It is hard to know why it isn't more but certainly one of the reasons would be because I guess a lot of mothers simply don't want to take their kids out at night.

THE WITNESS: That I think probably has something to do with it.

Well, if I might interject an opinion in this. I frankly feel that, from talking even to some people who are involved in this, not only don't they want to take them out at night, but they don't want to take their children up to

a prison.

THE COURT: That is another matter. That is an opinion.

Don't misunderstand me. It is that question, you know. Quite understandable.

THE WITNESS: Because of the exposure that we are talking about to other people.

Q Warden, what I was getting at is, have you ever done any study as to whether the institutions that have afternoon visits such as HDM have a larger percentage of women visitors, for example?

A I don't follow.

Q Since it is during the day?

A I know you--

THE COURT: I assume he left it to the Legal Aid Society to make the study.

A I know how many of these HDM and CIFM, as we call it, usually run about the same amount. Whether that means anything to you or not, I can't say.

Q In terms of the type of visits.

A The Correctional Institution for Men is the sentence institution. They usually run about the same

Q In terms of the kind of visitor you get and the kind of atmosphere you have in the visiting room, in the

bridge control area, during the daytime as opposed to the evening visits, you say it is exactly the same?

A Of course, the same type of people visit in the daytime for MDM as visit in the nighttime for the Adolescent Reception Detention Center.

THE COURT: I think we have to make a very detailed survey to try and weigh the difference, if there is any.

I don't know how you can answer that.

THE COURT: To the quality of the people that come in the day or night.

Q I gather you have never observed the children visiting at the Tombs, did you?

A No, I didn't. I have enough problems on Rikers Island; I hate to say that.

Q By the way, are you accepting visitors on to the Island earlier now than you used to?

A I don't --

THE COURT: Earlier in the day?

Q Earlier in the day? You remember the last time you were here --

A Nine o'clock we spoke about.

Q You testified there was a particular hour when you started.

A We moved the visiting hours of the House of

Detention for Men up one hour, so the answer under those circumstances would be yes.

Q How much earlier do you let people on to the Island?

A It is one hour, nine o'clock.

MR. BERGER: No further questions.

THE COURT: All right, gentlemen.

Before anybody gets an idea for another question, I am going to call it quits.

I thank you very much. I am sorry I had to call you back.

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TRANSCRIPT OF CONFERENCE AND HEARING
March 23, 1975.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

JAMES RHEM, ROBERT FREELY, LEO ROBINSON and EUGENE NIXON, individually and on behalf of all other persons similarly situated,

Plaintiffs,

-versus- 70 Civ. 3962

BENJAMIN J. MALCOLM, Commissioner of Correction for the City of New York; etc.,

Defendants.

----------X

New York, N.Y.
March 23, 1975
10:25 a.m.

Before:

Hon. MORRIS E. LASKER,

District Judge.

Appearances:

JOEL BERGER, Esq. and
STEVEN HERMAN, Esq.
The Legal Aid Society
Attorneys for Plaintiffs

W. BERNARD RICHLAND, Esq.
Corporation Counsel, City of New York

By: DONALD J. TOBIAS, Esq. and
DONALD M. NUSSBAUM, Esq.,

of Counsel

(Case called.)

THE CLERK: Plaintiff ready?

MR. BERGER: Ready, your Honor.

THE CLERK: Defendant ready?

MR. TOBIAS: Ready.

THE COURT: Gentlemen, have you decided between you as to what order you want to present your positions? I don't care one way or the other.

MR. BERGER: No, we haven't. Our motion was filed a day sooner.

THE COURT: It doesn't make any difference. Mr. Tobias, do you care?

MR. TOBIAS: No.

MR. BERGER: Your Honor, both sides, as you know, have submitted quite detailed memoranda on the individual issues that are before the Court on these motions.

THE COURT: Yes.

MR. BERGER: And in the time I have available, I do not intend -- I don't think it would be possible to cover every single issue in detail, but what I would like to try this morning is to discuss these issues with your Honor in terms of the basic constitutional theories that are at work in this case, and to try to apply that to each of the issues as we go along.

As your Honor knows, the fundamental theory that governs this case, the correlary of both the due process and equal protection arguments is what we call the least restricted means test.

I am sure your Honor is very much aware of that.

The conditions of confinement for a detainee must add up to the least restricted means consistent with the one and only governmental purpose of holding them in custody.

Now, that does not exclude defenses on grounds of security, since we don't want escapes, or else you wouldn't be able to bring these people into court, and you want to protect their lives and safety so they will be produced in court in one piece.

But the least restricted means test does not countenance defenses based upon existing physical plant or existing budgetary considerations, because just as an example, you may recall early in the trial, on the issue of contact visits, it's true the main defense was security, but I recall we were taking tours through the Tombs, and they said, "Judge, we can't do contact visits. We don't have any place to do it. We don't have the space. We don't have the manpower to do the searches. We just can't do it."

Of course, your Honor's response to that was,

"I'm not asking you to do something that is an absolute physical impossibility. I am not asking you to walk on water or to defy the laws of gravity. Of course, you can do it. You may have to alter an existing structure to do it, you may have to hire more staff to do it. But if a constitutional right is involved, you have to do it."

Now, Judge, this line of analysis was consistent throughout the original opinion. I know that for me one of the pleasures as an appellate counsel in defending that opinion on appeal was that this theory held in good stead on every single issue; there was no place where the City could play off one issue against another and claim that there was any kind of inconsistency or arbitrariness. Once you accepted the basic least restricted means test, every other issue in the case fell very neatly into place, and as I anticipate standing before the Court of Appeals again in only a few months' time to defend this judgment, which by and large is extremely favorable to plaintiffs, I am troubled that on the two issues of visiting schedules and recreational schedules, with all due respect, your Honor appears to have departed from that consistent theory, because if their existing physical plant at Riker's Island can be a defense on visiting schedules, why can't it be on contact visits or on optional lock-in or lock-out time or on anything, and if

their existing staff levels and budget can be a defense on recreation, the exact recreational schedules, every other issue in the case involves staff, involves money.

Contact visits, for example, probably need more staff if they are going to search people properly. Every issue involves staff and every issue involves -- most of them involves, to some extent, physical structure.

THE COURT: Let me answer you with regard to recreation, at least in particular. I don't recall that I ever determined in the original opinion that a precise amount of exercise was required.

MR. BERGER: That is correct.

THE COURT: But only that what did exist was constitutionally insufficient.

MR. BERGER: Yes, that is true.

THE COURT: And I don't think in my most recent memorandum that I have done more than try to close in on what is constitutionally adequate.

It is clear that in that memorandum I believed that five days of 50-minute hours would be constitutionally adequate and, as I pointed out, and I am sure you agree, regardless of whatever else all of us may wish to achieve, the Constitution sets minima, not maxima, so I don't think it is just a question of money.

I do comment on the fact that to go beyond that would create problems which involve a certain balancing process, whether that is compelled or not, it is one which in today's economic climate, I think a court has a responsibility to consider, regardless of the general proprosition to which I fully subscribe, that money should not stand in the way of furnishing constitutional rights.

MR. BERGER: Your Honor certainly has responsibility to consider it in terms of how much you make them do, how quickly, but to consider it in absolute terms means that perhaps my clients have a right, a constitutional right, to less recreation next year if the budgetary problem gets worse, to more recreation if it gets better. To open the door to that kind of balancing process is extremely dangerous in this kind of litigation. Every single issue, like contact visits, Judge, they have come right back on contact visits and said, "Well, does it have to be every visit? Since recreation doesn't have to be every day, perhaps contact visits doesn't have to be every visit. Maybe it could be every second visit, every third visit. Because of our structural problems, we don't have the space. We don't know what is going to happen."

#2 Once you open the door to that kind of balancing process, it is more than just one issue here, it is more than

two days of recreation; the theoretical consistency of the case is undermined and then --

THE COURT: What you are saying is you are more concerned about the reference to the balancing process than you are about the particular decision as to whether it is five days a week, is that right?

MR. BERGER: .I think that would be a fair statement. Of course, we do believe the record reflects there should be daily recreation and all the witnesses have said that. We are extremely concerned with the language, because we think it can be used to undermine everything else in the case.

The place where money can be taken into account, quite understandably, is on the basis of relief. In Suffolk County Jail versus Eisenstadt, the judge gave them three years to get their house in order. If your Honor had given them any more days than you did here, I don't think that we could possibly claim there is an abuse of discretion -- certainly not -- and that is where the economic climate can be a factor and all the City's problems can be a factor, but not in defining what people's rights are.

On the subject of visiting schedules, the opinion almost seems to say if they are in the Tombs, I could set a different degree of minimal constitutional standards for

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visiting schedules than the Court can at ---

THE COURT: Well, I think you have properly construed my views on that point by what you have just said, and I would be glad to be guided by anything that you can find that indicates an absolute with regard to the question of what constitutes constitutionally adequate visiting schedules.

It does seem to me that the physical facts relating to the facility, its location, its structure and so forth, are factors which it is reasonable to take into consideration in determining what is proper constitutionally as to visiting schedules.

There are, as I see it, two points that might be made with regard to the question of constitutional visiting schedules. One is that clearly some visiting must be allowed. The second is that the least restrictive, etcetera, theory implies that if you have the possibility within your power, that is, if the institution has the reasonable possibility within its power of granting more than some visiting, it should grant more.

Now, one might say, for the purposes of discussion, and only for discussion, that visits at least once a month are constitutionally mandated, no matter whether anybody has ever said so or not, but that if a

facility can easily afford visits three times a week, that is a factor which a judge has the right to take into consideration because it relates to the least restricted means test in your proposition.

What I have tried to do with regard to the visiting schedules, both at the Tombs -- although we never actually got to set them -- and at Riker's Island, was to consider these two factors; that clearly people had a right to have visits and to have visits from those closest to them, specifically their spouses, and in the City of New York, where -- well, it could be true in most jails, I suppose now-- in any event, with regard to jail population, where most of the people are married to women who are either working or mothers, then to see to it that the schedule was arranged in such a way that there should be at least a weekly visit from that spouse or made possible for that spouse.

The other element, the one that you commented on, has to do with whether, in my judgment or the judgment of the Court, the institution has a capacity, both physical and financial, to do better than what otherwise be a minimum, and in that sense I do believe that the Tombs has a clear capacity to do better than what would otherwise be the minimum, and I do think Riker's Island has less of a capacity, and these are very difficult propositions to force

to the mat in framing constitutional standards, and I think it is well for me to articulate my thinking so that all of you can understand how I have approached it.

Now, if there is authority that would help to make it more specific, I would be very glad to be directed to it, but I don't know of it.

MR. BERGER: Your Honor, I think I can point to three different standards that the Court can look to in determining what the minimum should be, leaving aside the other line of analysis, what the bare minimum on the constitutional theory should be.

First, we have the equal protection analysis. The smallest visit a convict gets in New York State is two hours.

THE COURT: Sorry, what was the last point you made?

MR. BERGER: The smallest the narrowest visit, the least lengthy visit a convict ever gets in New York State is two hours.

THE COURT: A convict. Right.

MR. BERGER: And that applies whether he is up in Clinton, where it is hard to reach him, or Sing Sing, where if you live in New York City you could conceivably get up there every day.

Your Honor makes the trip every day. I assume if there are people who want to see somebody bad enough, they could go up there practically every day.

Secondly, we look to --

THE COURT: That isn't realistic, though. It is simply not the case that people visit state institutions as often as they visit city jails. Whether it applies to Riker's Island is hard to determine. No one has made a study of it, and the very distance to Riker's Island is an ironical fact which it seems to me cuts both ways.

MR. BERGER: Your Honor, we do know the level of visiting out there is only half it was at the Tombs at the time of the trial, total volume of visits. I believe I cited those statistics at the conclusion of the summation, our oral summation. They are at page 334 through 335 of the transcript of January 21st. And I, in that transcript, make references to the specific points in the record where my statistics are drawn from, the testimony at the time of the trial, the testimony at our visiting hearing after the opinion came down, and then the testimony most recently of Warden Thomas at this hearing, the visiting volume was about half.

Secondly, look to minimal correction standards which certainly have played a role in all the court decisions.

The American Correction Association says ordinarily nothing less than one hour per visit would be adequate. That is at page 543 of the Standards, and it was cited in the opinion, your Honor's opinion, at page 607.

Finally, and perhaps most important of all, there is the case law. In Brennerman v. Madigan, which the Court cited in its initial opinion, the statement was, as a general proposition, a pre-trial detainee should be able to visit whomever he pleases for substantial periods of time each week.

Now, half an hour a week, which is what it comes down to for people who work, could not possibly be a substantial period, and the fact that in Brennerman it was only 15 minutes doesn't mean that half an hour makes it substantial by any definition of the word "substantial."

Your Honor also cited Jones v. Wittenberg, which--

THE COURT: I cited lots of these cases. I don't know whether I cited them for the proposition of the number and time.

MR. BERGER: I can't be certain. You cited the page cites where these quotes are on and that's about as far as I can go.

THE COURT: In connection with visitation.

MR. BERGER: In connection with visitation, and

these were not contact visitations; these were visiting schedule cases. Jones required daily visiting hours, both in the day time and in the evening, daily, and I cited to your Honor three more cases which are not cited in the opinion which are not published. I can make them available to you. They all basically repeat the language of Brennerman and Jones. They don't say anything new -- they use that very language, substantial periods, daily hours, both in the day time and evening -- one from Florida, one from Nevada and one from Nebraska, cited at page 4 of our memorandum.

So I believe there are standards.

I would agree with your Honor, once they meet the minimal standards, then perhaps there can be a balancing process beyond that, but it is our position that half an hour a week for a relative who works is not even meeting the minimal standard, and I think we have substantial authority on that.

Finally, on recreation, just briefly, we would request an implementation deadline. I think the sad experience after the opinion came down in January 1974, was without specific deadlines; we kept having conference after conference.

THE COURT: What does the judgment say on that

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point?

MR. BERGER: The judgment simply states that they shall make their best efforts. Let me look at the precise language -- shall forthwith take all steps necessary to employ such additional personnel as necessary.

THE COURT: "Forthwith" seems to me -- I thought I recalled the word "forthwith" in there. It was intended to be and normally would be construed to mean right now. shall do what is necessary. So that is why I didn't include a deadline in there, because I meant that it should be done as soon as it could be done.

If the plaintiffs feel that they need a deadline in there as well, I will consider it. But I hoped that the City understands that forthwith meant you should be already at it, except for the fact that we have had this mo tion for reargument.

MR. BERGER: Under ordinary circumstances I would interpret it the same way, but because of the history of the case, which the Court of Appeals commented on specifically -- and it is in our brief where they commented on it -- we f el that detailed and specific deadlines are helpful.

I don't think it is necessary to touch on the issue of numbers of visitors, but I think we covered that

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adequately in the brief, a very simple issue.

THE COURT: Yes.

MR. BERGER: I would like to turn briefly to the City's motion, and particularly to the subject of lock-out time which I think is the most heavily contested one in this motion.

The City's approach on the issue of lock-out time is severely myopic. It totally loses track of what the case is about. We are not talking about carving out an extra hour here and there in their schedule. The issue is one of providing non-maximum security housing for the great majority of pre-trial detainees. I don't care what administrative excuses are used, if you lock up people for most of the day in cells, that is maximum security housing, and we know that there are institutions, many institutions, that don't do it and that the standards say most people, and all the expert testimony that was accepted at trial says that most people don't require maximum security housing.

Now, I think the Court would certainly agree that HDM is a maximum security institution, the same way the Tombs was.

THE COURT: I think the defendants agreed to that, or I do, certainly it is.

MR. BERGER: And this Court stated most detainees

can be safely held in less than maximum security. That was your holding. It was affirmed. I know the City's witnesses don't believe it. They approach it from a completely different viewpoint.

THE COURT: It isn't necessary for the plaintiff to argue that further because I certainly do continue to hold to that as the fact, and, indeed, of course, I wouldn't have worded contact visits and so on at Riker's Island if it weren't my position that those propositions apply just as much at Riker's Island as they did at the Tombs.

MR. BERGER: In our memorandum in opposition to their motion, we have tried to translate that basic theory into the details on lock-in time and what we attempt to show is that it is not a question of an extra hour here or there, but affording greater, substantial freedom of movement, and we turned to the Board of Corrections on this subject with regard to the Tombs, where they pointed out, relying on testimony of Warden Gangler and testimony of Warden Schaeffer at the Tombs, that although they probably would be better, in providing non-maximum security housing, to have dorms, to have rooms, to have a whole variety of different living arrangements, that it is not absolutely necessary to do it that way, that you can close off certain quadrants or areas and leave the cell doors open for people who, on the basis of

your classification system, you trust as non-maximum security risks.

Leave the doors open. If someone is not a maximum security risk, you can trust him not to sneak into the next fellow's cell at night and steal his things or injure him. If someone is non-maximum security, you can trust him not to get on the meal line twice, not to interfere with cleaning, to step aside when a broom comes down the corridor. It doesn't require half an hour of locking in a man in a cell. And this is what we are talking about, not merely a few minutes here and a few minutes there.

Warden Gangler, Warden Schaeffer of the Tombs say to the Board of Corrections, that even without physical renovation, the system of leaving cell doors open and blocking off certain floors or parts of floors -- he said, "We can do it today, as the structure exists now, if we have a classification system. We don't even need to have a dormitory available yet. We can give people that degree of freedom of movement."

So that is really what is at stake here, that most people needn't be locked in most of the time if you treat them as non-maximum security detainees.

Now, even for maximum --

THE COURT: May I ask you this, putting aside

this problem of getting on the meal lines and the claim of the City that because they could do it for one side, but they can't do it for the other side, they shouldn't do it for either side, which creates problems for a judge even if it doesn't for a lawyer, what is your view as to how late at night the cell doors should be closed?

MR. BERGER: For non-maximum security we believe--and the testimony reflects it; both the Board of Corrections and the testimony at trial -- you don't have to lock them at all, the non-maximum security. It is the same as if it were in a dormitory where obviously people can get anybody else's property.

THE COURT: Putting it a different way, what is your view as to when people should be in bed, lights out and not wandering around, maximum security or otherwise?

MR. BERGER: The Tombs -- Warden Thomas stated at page 167, the lights are out at midnight and that's perfectly fine with us. They lock them in at 10:00, take a count at 10:00, don't take another count at midnight, but leave the lights on, two hours when nothing happens. Even for maximum security people, even for maximum security, the only reason for locking them in for those two hours is purely administrative conveniences. They don't want people moving around. They have reduced staff. Two officers have

gone home. And I don't believe that even for maximum security those two hours of lock-out time are required. But most detainees can be held in less than maximum security, and you might want to tell them they shouldn't be wandering around and the lights should be out, but there is no need to confine them in cages the entire night.

THE COURT: I think it really becomes a technicality, whether you have to be in your cell with lights out at 12:00 o'clock, the bar is locked or not locked at that time.

MR. BERGER: It allows for exceptions. A man can walk down a catwalk if he gets sick and ask to see a doctor. I assume if a man is nervous or whatever, there can be some provisions that people can walk around and don't have to remain fixed to their mattress the entire eight hours. That is what non-maximum security is about. And I refer your Honor to our brief, to pages 4 and 5, where we set forth all of the expert testimony at trial, culling it from your Honor's opinion on this subject.

Frankly, for most detainees, it shouldn't even be the structure itself. We are near the end of this case. There is a limited number of Tombs transferees. If we are back at the Tombs, we wouldn't just be saying leave the cell doors open because it is a much deeper issue than that.

But at least the remaining months of this case --

THE COURT: What I am doing here has precedential value, which has got to be considered, aside from the particular people.

MR. BERGER: We are very much aware of that, your Honor.

THE COURT: Of course, I am sure you are.

MR. BERGER: But we felt that we would opt for the simplest and easiest way on this issue at this time, and I certainly want to make it clear on the record that we do not mean to say that there shouldn't be dormitories or other forms of non-maximum security housing, and if we had more time, if the case was going to go on longer, we certainly would raise those issues.

THE COURT: Mr. Berger, I don't remember how long you have been talking, but I am going to have to limit you, because I am behind schedule, and I have a trial as well.

Is there anything of critical importance you have to add?

MR. BERGER: The only other issue that I would mention briefly is in response to their motion on contact visits. Their brief actually says one point -- I am quoting-- "It is not possible to predict the results of implementation of such a program."

That is why they want a delay. After two years of litigation, findings of fact and affirmance, they are still saying that.

But I must point out to your Honor that what they are asking for there bears a certain amount of logic in terms of the problems that we have with the opinion, because they are saying, if you can make exceptions and give a little bit less here, a little bit less there, then why not give a little bit less on contact visits?

THE COURT: Let me answer you both on that: That, it seems to me, is inevitable in life; exceptions apply in some instances and don't apply in other instances, and I really don't agree with either party that there can be no exceptions on the one hand or that inevitably means you should make exceptions on everything else as far as the other is concerned.

The question is, is an exception appropriate in certain circumstances or is it not, and each one of these issues has to be regarded separately in that regard.

MR. BERGER: I understand that, your Honor. In terms of defining minimum standards, we believe at that point there can't be exceptions based on physical structure.

THE COURT: By definition, of course, minimum standards does not permit me to.

Mr. Tobias.

MR. TOBIAS: Your Honor, we have moved pursuant to Rule 59 in order that this Court amend its judgment dated February 20, 1975.

While the judgment of this Court takes into account factors that were set forth in the original opinion and subsequently affirmed by the Court of Appeals, we submit that further clarification calls for the following changes:

I am just going to briefly highlight them. I think that they are more clearly elucidated in the memoranda that we have submitted.

I would like the Court to focus attention on number two, the right to leave cells. Now, I think we established at the hearing that the inmates at HDM remain locked out of their cells at all times except when otherwise required for the legitimate purposes associated with running an institution of this size, nature and scope.

THE COURT: You say remain locked out. By that you mean may leave?

MR. TOBIAS: Are locked out, yes. We will get into the issue of optional lock --

THE COURT: The terminology is very confusing sometimes.

MR. TOBIAS: They have lock-out time during all

times except when otherwise required for the purposes normally associated with running an institution.

THE COURT: I consider having lock-out time as being different from optional lock-in - lock-out. Some people may just as much dislike being required to be out as being required to be in.

MR. TOBIAS: I am just trying to discuss this in terms of the chronology of the order.

THE COURT: Right.

MR. TOBIAS: The Court recognized, I think, that there are certain times when the inmates have to be locked in their cells, and the Court specifically focused its attention on the issue of cleaning and counting.

THE COURT: Right.

MR. TOBIAS: We feel -- we agree with this approach, your Honor, but we feel that there are other factors which should be taken into consideration as well, particularly we feel that from 9:30 p.m. up until 5:15 a.m., the time when the inmates are awakened, it is a period of about seven and three-quarter hours; we feel that this period of time enables the inmates, regardless of any security classification -- gives these inmates a chance to remain in a relatively quiet atmosphere so that they can sleep. Twenty-five percent of these inmates will be going to court

the next day and we feel this is an important --

THE COURT: You think it would be noisier if they were allowed to move around.

MR. TOBIAS: Absolutely, and we feel that the tranquility associated with this is an important factor that the Court should take into account.

There are other factors that were also stressed. At the hearing I think your Honor alluded to them briefly. For instance, a court separating process that goes on after breakfast, a process where inmates who are due to appear in court that day have to be ferreted out, have to be separated. We feel that, as stated by Warden Thomas, should take place in an atmosphere of minimal confusion.

In addition, this whole feeding process which your Honor, I am sure, is well aware of, is a structured activity in which the lock-out schedule that has been established at HDM has been built around, so we feel these are other factors, the counting, the sleeping, and this court separation process, these are factors that the Court should take into account, and I think that if the Court reviews all of these factors it will see that the administrators of HDM have not locked anybody or not imposed a lock-out schedule that in any way imposes maximum security conditions.

I think that the entire lock-out scheme that we have shown to this Court in the last few weeks is a legitimate function of administering an institution of this type.

THE COURT: Let me comment on that. I think a more solid conceptual way of putting it would be to admit that it is maximum security, but that there are certain circumstances under which it is justified that everybody be treated in a certain way.

For example, you can't pretend that when everybody is locked in their cells from 9:30 at night on, it wouldn't be maximum security. You can say, and I gather you do argue that it is justified under those circumstances, because everybody will be quiet and that is to the general interest of all the prisoners.

MR. TOBIAS: I would agree with that, your Honor.

Now, turning to Point 3 of the judgment, optional lock-in, this Court in its original opinion in January of 1974 required the defendants to come up with a plan, an experimental plan that implemented a program of optional lock-in.

THE COURT: That's what confuses me a little, your reference to that. It seemed to me in this judgment I did the same thing. I specified --

MR. TOBIAS: Your Honor, I would say there's a

very distinct difference. At the Tombs, at the time of trial, there was no optional lock-in. People were forced out of their cells during all lock-out periods, and they did not have the option to return to their cells. You found this to be an unacceptable practice, and you were sustained by the Court of Appeals.

#6 However, the optional lock-out feature, the optional lock-in program, was already built into HDM upon its opening in late 1973, so we have a program in existence there. The program of optional lock-in at HDM encompasses all lock-out periods, with the exception of those four hours in which the programs are at their maximum level of operation, the programs and services, etcetera. This was all testified to by Wardens Thomas and Bueno. It was their judgment that during these four hours, only on Mondays through Fridays, it would not be in the best interests of institutional efficiency if there was an optional lock-in program at this time, and we feel that based upon the statements made by Warden Thomas, which were largely uncontradicted at the hearing, we feel that these statements should be given a degree of weight, particularly in view of the fact that they were not contradicted by any witness at this hearing.

THE COURT: Isn't this the issue -- has anybody got a copy of the judgment here?

JKd

MR. TOBIAS: Your Honor, in the memorandum opinion, your Honor pointed to the fact that the Court was not fully persuaded that putting in optional lock-in during these hours would inhibit the visitation process. We feel there are other factors in addition to the visitation process that would, in fact --

THE COURT: I will consider those, of course, Mr. Tobias, but let me respond to you as I did with Mr. Berger.

First of all, the first argument of the City is that I adopted an experimental, or proposed an experimental approach on this subject in the first Rhem opinion. It is precisely what I am doing in the second one here.

I specify that an experiment shall take place on one of the cell blocks, and that the procedure shall be followed thereafter unless you find that it isn't any good, in which case you let the plaintiffs know, and they would let me know what they think of the situation.

With regard to the question of the persuasiveness of Warden Thomas' testimony, I tried to indicate, and I think he would feel that whether I indicated it or not in my memorandum, that I think very highly of Warden Thomas, both in terms of his experience and of his desire to treat his customers decently, and that he has got a very hard job,

because he has a tough facility to deal with, I mean a facility that is difficult to deal with in view of its own limitations -- not quite as bad as the Tombs, but creating their own problems. I don't want to substitute my judgment for his as to how an institution ought to be run, but some of the things that constituted fears on his part just didn't seem to me to be persuasive.

MR. TOBIAS: I understand that, your Honor. I just wish that you would take into consideration the fact that there was no optional lock-in at all in the Tombs and that there was a complete --

THE COURT: I do take it into consideration, but I am afraid it doesn't solve the problem. It would be a lot easier to say --

MR. TOBIAS: It is only a question of our not putting in optional lock-in on four hours of the day and the rest of the hours there is an optional lock-in program, and I wish your Honor would take into consideration those additional factors other than visitation that I have mentioned in my papers.

THE COURT: I will take them into consideration.

MR. TOBIAS: Moving on to the next issue that is contact visits, the defendants have stated to this Court that they will submit a plan within 90 days which --

THE COURT: Of what?

MR. TOBIAS: Which will set forth a program for the implementation of contact visits.

THE COURT: 90 days of what?

MR. TOBIAS: 90 days of the final signing of the order.

THE COURT: You don't expect me to be impressed by that? 90 days ago you told me we would have a plan. We still don't have a plan. Nothing's been holding it up.

MR. TOBIAS: Your Honor, the plan is in the works. I have had communications both with --

THE COURT: Mr. Tobias, there does come a time after which I have to say the City has cried wolf so many times that I am totally unimpressed.

MR. TOBIAS: I understand this, your Honor, and --

THE COURT: I don't hold you altogether responsible -- I don't like to even put it that way, but you have been aboard quite a while now, yourself.

MR. TOBIAS: Let me say this, your Honor: The focus of this lawsuit has just recently been transferred from one institution to another institution. It was not contemplated by the people who run the Department of Corrections that the Court would be focusing its attention on HDM, quite frankly, and we have just had to make these --

we just had to consider these factors as it relates to an entirely different setting only a few months ago.

THE COURT: This is now four months since you have known you were going to use this place. All right, let's not argue about it. My position on contact visiting is that that program should be put into effect as rapidly as it is humanly possible. I really think that is the one major thing that has come out of this case, aside from the fact that -- well, the general proposition that the jails of the City have to meet constitutional standards, and I don't see any reason why, if the City is in good faith about it, it can't swing around and allocate whatever resources of manpower and attention are necessary to get that problem solved.

MR. TOBIAS: As I stated to your Honor, this will be done, and a plan will be submitted to the Court. However, I think --

THE COURT: You don't have to wait until this judgment is signed and "X" days go beyond that.

MR. TOBIAS: I know, your Honor, but I think we would like --

THE COURT: I am not going to trim my sails because of the fact that the motion for reargument has been made on that point.

MR. TOBIAS: I understand, your Honor, but I think we have to distinguish between submitting a plan and the actual implementation of it. I can't represent to this Court that within 90 days contact visits will be in operation. I can't.

THE COURT: I don't think I am going to go for a plan approach again. I think I am going to go for a specific period of time, and you can show me why it can't be done within a specific period of time.

MR. TOBIAS: Perhaps the plan will set forth when this can be implemented to your satisfaction.

#7 THE COURT: If it doesn't I don't know what it would be worth.

MR. TOBIAS: I think it is going to be in some more detail as to who would get the contact visits.

THE COURT: Get it done by such and such a date. Forget planning any more.

MR. TOBIAS: But I wish your Honor would take into consideration that the order as it is stated now states that we should have the program actually in operation within 90 days.

THE COURT: That's what I meant. This is the one subject I thought we fooled around with long enough, that plus recreation.

MR. TOBIAS: I understand -- I am in agreement with you, but I do say the practical realities force us to submit to you a plan.

THE COURT: As was said, practical realities adjust themselves to the amount of pressure applied -- sometimes, anyway.

MR. TOBIAS: Your Honor, we also feel that the defendants should not be required to provide contact visits to all, but to suitably classified inmates. We don't know what --

THE COURT: Why not?

MR. TOBIAS: Your Honor, we don't know what the reaction is going to be to this contact visitation program in terms of volume of visitation and we would like to be able to see exactly what the response is going to be.

THE COURT: What other bogeyman than this now? We have talked about contact visits for two years, three years, whatever it is, and each time some new fear comes up. What are the current fears?

MR. TOBIAS: We have never seen this in operation.

THE COURT: But hundreds of other institutions have seen it in operation. Why is it going to be so different here?

MR. TOBIAS: Detention facilities are not --

I am not that certain about it, your Honor. Detention facilities which have large numbers of visitors coming every day, I think there is a difference --

THE COURT: What is the difference?

MR. TOBIAS: The difference is the sheer volume of visits that is characteristic of a --

THE COURT: You expect there will be more visitors.

MR. TOBIAS: Could very well be.

THE COURT: What if there are?

MR. TOBIAS: Then I think it would be not unreasonable to combine contact visits with the booth visits as part of a visitation program, and we feel that we should be given the requisite flexibility --

THE COURT: I think the proper way to approach it is for you to come back, in the event that threat occurs, and ask to be relieved of your obligations, rather than to be protected in advance. This one subject is one that I think is clear-cut and has gone on forever and means very, very much to prisoners.

I think that myself -- although again, I don't like to sound like an expert, although we have all been dealing with this so long we have some right to feel like experts -- that it could well work out here, contact visits

would improve the morale of prisoners to such an extent that the administration will ultimately be glad that it occurred, and I hope that I am right in that belief.

MR. TOBIAS: We just ask, and your Honor can just consider this, that we be allowed to have a flexible program that also considers the presently existing facilities.

THE COURT: I would not return to your clients saying that you think the Court is likely to do that.

MR. TOBIAS: Your Honor, with respect to the classification system, that is part of paragraph 4 of the judgment.

THE COURT: Yes.

MR. TOBIAS: We feel that the burden should not be placed upon the defendants to justify everybody who is classified as not being suitable to receive a contact visit.

THE COURT: What's the whole point of the classification system? Who is going to do that?

MR. TOBIAS: Your Honor, the classification --

THE COURT: The Legal Aid Society?

MR. TOBIAS: The classification system will do it. I don't think that every time somebody is classified --

THE COURT: I see what you mean. That is something -- you mean coming to court?

MR. TOBIAS: Right.

THE COURT: That is something that I think does have to be taken seriously, not only from your point of view, but from mine. All right.

MR. TOBIAS: And with respect to visitation schedules, that is paragraph number 5, we agree that the Court has set forth a minimal standard in paragraph 5(a), that that, based upon our reading of the cases, is an appropriate one.

5(b), however, gives us some problems in that it again limits the flexibility of the administrators at NDM.

I think that your Honor realized that we have to take into account the other facilities existing on Riker's Island, and I think that having to be fixed into a specific number of visitation periods per week precludes the possibility of experimentation.

At this time the defendants do not --

THE COURT: Are you prepared to accept the fact that there should be no less total visiting time?

MR. TOBIAS: Your Honor, then we will get into a situation where we have to count minutes.

THE COURT: Yes.

MR. TOBIAS: I am saying that if the defendants structure a different program after the contact visitation program has been evaluated and after the entire scope of

visitation at Riker's Island has been again re-evaluated, if this number of visits per week is reduced and nothing is compensated for it, and the plaintiffs feel it is done irrationally, they can come back into court, obviously, on a motion.

We feel that we shouldn't be boxed into specific number of days. There has been some talk of lengthening the visitation hours.

THE COURT: No one is going to object to that, obviously.

MR. TOBIAS: Your Honor, within the constitutional minima that you have set forth in paragraph 5(a), it would become impossible to do this without perhaps reducing the number of days in which visits were given.

I think that again we want to be in a position of being able to use the facilities in a flexible way that maximizes the wants, the ability to provide for the wants and needs of the inmates, and that is really all we are trying to do here.

I don't think that we --

THE COURT: I do understand that. I mean, I understand that is all you are trying to do. The question always arises, of course, where flexibility has got to end when constitutional standards meet them.

All right.

MR. TOBIAS: The final point is the question of discipline. There has been some degree of argument on this. This was raised by your Honor very recently in response to a statement that Commissioner Malcolm had made, and I would just like to state that we feel that the arguments that were raised in the Giampitruzzi brief are still applicable, notwithstanding the letter submitted by Mr. Donnino.

#8

THE COURT: I don't agree with that, and you will have to fight that out at a higher level, Mr. Tobias.

MR. TOBIAS: I think Mr. Donnino's statements were addressed to special housing units, which are the State's analogue to administrative segregation. I believe there was a bit of confusion here.

THE COURT: And I do not agree with the City's theory that because people are worse off in the jails than they are in the prisons, you therefore can deprive them of less, you ought to be able to deprive them of the less that they have.

MR. TOBIAS: I think that the scope of our argument relates to the fact that the State can take away somebody's freedom if somebody in fact violates institutional rules.

THE COURT: I understand that, but there are two

points that you made. One is that there is not an equal protection situation, and I find that there is.

Secondly, you said even if there is an equal protection, there is a distinction that makes it reasonable for us to do things or to deprive our detainees of privileges which a state prisoner might not reasonably be deprived of, and I don't buy that argument either.

MR. TOBIAS: Your Honor, the only other things we would ask this Court to do is at the present time we would like -- we have made an application that the order be stayed pending a final determination of this motion and also--

THE COURT: Yes, I do grant that application, but I intend to decide the motion as quickly as I can.

MR. TOBIAS: Very finally, this is a very technical point, turning back to number 3, the optional lock-in program; we have certain differences here which we have asked this Court to consider.

However, the Court has stated that they do want an experimental program and that within 30 days we are to report back to the Court.

There has been some question raised in my office as to appealability of this particular portion of the judgment. We don't want to be faced with having, at the expiration of the 30 days, if this is in fact a final order,

we don't want to be faced with the fact of having lost our rights to appeal. We would like to know whether this is an interlocutory or we would like this phrased in such a way that it actually becomes a final order if you do not agree with our position on this point.

THE COURT: I certainly won't do anything to prevent the appeal, and if it becomes necessary because of the inclusion of the conditional language in paragraph 3 to certify or to grant an application under Rule 54, is it, or whatever it is, I would be glad to do it.

I think that the issues here should be brought up to the Court of Appeals as quickly as possible if they are going to be brought up.

MR. TOBIAS: All right. Thank you very much.

One moment, your Honor.

(Pause.)

MR. TOBIAS: My colleague did remind me of one other thing I failed to mention. On paragraph 5(a) relating to visitation schedules, the last sentence really troubles the administrators of the institution in that the visitation program as presently in effect actually utilizes --

THE COURT: Yes.

MR. TOBIAS: -- utilizes fewer booths than actually available --

JKd 40

THE COURT: You think there would be rough and tumble fight for the booths if this were so?

MR. TOBIAS: Yes, I believe this is expressed in our papers.

THE COURT: Yes. I know. I can't hear anything further, I'm afraid, gentlemen.

I will read your briefs with the greatest of care and you know I am deeply interested in this case, but I have a jury waiting outside, and a trial to conduct.

Thank you.

* * * * *

Summons.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

JAMES BENJAMIN, MIGUEL GALINDEZ, BRUCE HAYES, JOSE SARDANA and ROBERT ESCHERT, detainees of the New York City House of Detention for Men, individually and on behalf of all other persons similarly situated,

Plaintiffs,

-against-

BENJAMIN J. MALCOLM, Commissioner of Correction of the City of New York; ARTHUR RUBIN, Warden, New York City House of Detention for Men; GERARD BROIN, Deputy Warden, New York City House of Detention for Men; and ABRAHAM D. BEAME, Mayor of the City of New York, individually and in their official capacities,

Defendants.

SUMMONS

75 CIV.

- -X

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY summoned and required to serve upon Joel Berger or Steven A. Herman, attorneys for the plaintiffs, whose address is 15 Park Row, New York, New York an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief requested in the complaint.

Dated: New York, New York
June 24, 1975

Clerk of the Court

Complaint.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

JAMES BENJAMIN, MIGUEL CALINDEZ, BRUCE HAYES, JOSE SALDANA and ROBERT ESCHLER, detainees of the New York City House of Detention for Men, individually and on behalf of all other persons similarly situated,

Plaintiffs,

-against-

BENJAMIN J. MALCOLM, Commissioner of Correction of the City of New York; ARTHUR RUBIN, Warden, New York City House of Detention for Men; GERARD BROWN, Deputy Warden, New York City House of Detention for Men; and ABRAHAM D. BEAME, Mayor of the City of New York, individually and in their official capacities,

Defendants.

- x

COMPLAINT
CLASS ACTION

75 Civ.

COMPLAINT

1. This is a class action on behalf of all pre-trial detainees of New York City House of Detention for Men, 14-14 Hazen Street, Rikers Island, New York (hereinafter "HDM") seeking declaratory and injunctive relief from the intolerable and unlawful conditions under which they are confined. The action is brought under 42 U.S.C. §1983 to redress the violation by defendants, acting under color of state law, of plaintiffs' rights under the First, Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the Constitution of the United States.

2. Jurisdiction is conferred upon this Court by 28 U.S.C. §§1343 (3) and (4) and 2201.

CLASS ACTION

3. This action is brought as a class action pursuant to Rule 23 (a) and (b) (1) and (2) of the Federal Rules of Civil Procedure.

Complaint.

(a) Plaintiffs sue on behalf of all persons who are or will be held in detention at HDM for the purpose of ensuring their presence at the trial or other disposition of criminal charges against them.

(b) The class consists of over 1400 members and is so numerous that joinder of all its members is impracticable.

(c) The conditions and practices that are the basis of this complaint are common to all members of the class, and the relief sought will apply to all of them.

(d) The plaintiffs are pre-trial detainees at HDM. They will fairly and adequately protect the interests of the class.

(e) The prosecution of separate actions by individual members of the class would create a risk of inconsistent adjudications with respect to each which would establish incompatible standards of conduct for defendants.

(f) The defendants have acted or failed to act on grounds generally applicable to all detainees of HDM, and the appropriate injunctive and declaratory relief would apply to the class as a whole.

PARTIES

4. Plaintiffs are persons charged with crimes under the New York State Penal Law who are detained at HDM in lieu of bail to insure their appearance at trial.

5. Defendant BENJAMIN J. MALCOLM is Commissioner of Correction of the City of New York. He is the chief administrative officer of the New York City Department of Correction, which is

responsible for the maintenance and operation of all New York City correctional institutions, including HDM.

6. Defendant ARTHUR RUBIN is Warden of HDM. He is responsible for the management and supervision of HDM, for the humane treatment of plaintiffs and for the maintenance of proper discipline within the institution.

7. Defendant GERARD BROWN is Deputy Warden of HDM. He is, under general direction of the Warden, charged with the custody, care and treatment of plaintiffs. He is responsible for the enforcement of all laws, rules and regulations affecting the administration of HDM.

8. Defendant ABRAHAM D. BEAME is Mayor of the City of New York. He is responsible for the administration of all City departments.

STATEMENT OF CLAIM

9. As a result of defendants' actions or failure to act, the plaintiff class is confined at HDM under conditions which are unconscionably oppressive and degrading and which violate plaintiffs' basic constitutional rights as citizens and as persons presumed by law to be innocent of any crime.

I

OVERCROWDING -

10. HDM is filled far beyond its present actual capacity, so that many detainees are confined in cells shared by another detainee.

11. The cells in HDM are approximately six feet wide by eight feet long. Space for mobility is actually much smaller, since each cell contains two bunk beds, a wash basin, and a toilet bowl.

12. Occupancy of cells of this kind by more than one person violates all recognized minimal correctional standards for the safekeeping of prisoners.

13. As a result of overcrowding, plaintiffs are deprived of privacy, freedom of movement, and adequate space within which to sit, eat, exercise or sleep. They suffer from severe physical discomfort and psychological distress. Prolonged subjection to these conditions is detrimental to their physical health and sanity.

14. Overcrowding at MDM puts a strain on all of the institution's facilities, resulting in a diminished capacity to meet the needs of the detainees. Kitchen, food-serving, laundry, medical, recreational, visiting and educational facilities, among others, are inadequate for the number of persons now housed at MDM.

15. Overcrowding contributes to an atmosphere of tension and hostility at MDM, both among inmates and between inmates and guards.

16. Convicted felons in New York State correctional institutions are confined one man to a cell in cells at least as large as those used at MDM for two detainees.

II

MAXIMUM SECURITY; LACK OF CLASSIFICATION

17. The custodial practices and the conditions of confinement at MDM are those of a maximum security institution. All detainees are treated as if they presented a high degree of risk of escape or of danger to the security of the institution.

18. A system of classifying detainees at HDM according to the degree of risk they present is feasible and would permit most detainees at HDM to be housed under conditions of medium or minimum security.

III

EXCESSIVE CONFINEMENT

19. Plaintiffs are confined in their cells for approximately sixteen hours per day.

20. During three brief "lock-out" periods, detainees are allowed out of their cells into a corridor (approximately 11 1/2 feet wide) and an adjacent "day-room." They are not permitted to visit other living areas, even those within the same block of the jail.

21. Detainees in HDM are subjected to more stringent confinement than convicted felons in New York State's maximum security prisons.

22. These unduly restrictive confinement practices are not necessary either to maintain security of a pre-trial detention facility or to ensure plaintiffs' presence at their trials.

IV

OPTIONAL LOCK-IN

23. During all lock-out periods except on weekends and weekday evenings, plaintiffs are required to leave their cells.

24. Defendants' failure to accord plaintiffs the option of remaining in the privacy of their cells during all lock-out periods is harmful to plaintiffs' mental health and increases the tension of confinement for plaintiffs.

25. Defendants' policy of denying plaintiffs the right to remain in their cells during all lock-out periods unnecessarily infringes on plaintiffs' privacy and is not necessary to preserve the security of HDM.

V

LACK OF RECREATION AND OTHER ACTIVITY

26. Plaintiffs are subjected to a regimen of enforced idleness and tedium during the entire period of their confinement at HDM.

27. Plaintiffs are limited to one extremely brief recreation period each week, in a gymnasium, for approximately nine months of every year.

28. The gymnasium is very crowded, and there is insufficient space and facilities for all detainees to exercise.

29. During the summer, plaintiffs are allowed outdoors in exercise yards for no more than one or two extremely brief periods each week.

30. The yards at HDM are very crowded, and there is insufficient space and facilities for all detainees to exercise.

31. The yards at HDM are closed except in summer, and plaintiffs are not permitted outdoors for most of the year even in clear weather.

32. Plaintiffs are accorded substantially less access to the outdoors and substantially less physical exercise than convicted felons in New York State prisons.

33. Jobs are available at HDM for only a small fraction of the detainees. Plaintiffs, who have often lost jobs as a result

of confinement in jail, are denied any opportunity to earn money to make bail, to help support their families, and to provide for their own needs.

34. Vocational training and education programs at HDM are extremely limited, and most detainees have no opportunity to participate in them.

35. The limited access to the outdoors, limited opportunity for physical exercise, and regimen of enforced idleness at HDM is harmful to plaintiffs' physical and mental well being.

VI

RESTRICTIONS ON VISITING

36. Plaintiffs are accorded extremely limited opportunities to receive visits from their wives, family and friends, and the conditions under which visiting is permitted are not consonant with their status as persons presumed to be innocent.

37. During visits the detainee is separated from his visitor by a soundproof wall with heavy glass panes. Voice communication is carried on by means of telephones which frequently are out of order.

38. The visiting booths at HDM are very poorly ventilated.

39. Defendants permit each visit to last no longer then 30 minutes. Actual visiting time is often reduced as plaintiffs and their visitors search for booths with operable telephones.

40. Visiting hours at HDM are only from 11-2 Tuesday through Friday and every other Sunday.

41. There are no general evening visiting periods at HDM. On Monday evenings detainees who have children may receive visits from them, but no adult may visit unless accompanied by a detainee's child.

42. Plaintiffs may not receive visits from their children at any time other than Monday evening of each week.

43. Defendants permit plaintiffs to receive no more than one visitor each visiting day, and no more than one adult and one child visitor on Monday evenings.

44. Convicted felons at New York State's maximum security prisons are uniformly accorded contact visits, as well as more extensive visiting hours, more visitors per visit, longer visits, and greater opportunities for children's visits than defendants accord plaintiffs at HDM.

45. The booth visiting arrangements at HDM are frustrating and degrading to plaintiffs and their visitors.

46. The visiting schedule and visiting regulations at HDM are unnecessarily restrictive and substantially limit plaintiffs' access to their relatives and friends.

VII

ISOLATION

47. The location of Rikers Island, inadequate public transportation to Rikers Island, and lengthy administrative delays which visitors encounter on Rikers Island render visiting so difficult as to severely limit plaintiffs' opportunities to receive visits from relatives, friends and attorneys.

48. Rikers Island is located at the western edge of Long Island Sound, adjacent to but separated by water from Bronx and Queens Counties. The Island's only connection to the New York City mainland is a bridge originating in Astoria, Queens.

49. Detainees confined at HDM are awaiting trial in New York, Bronx and Kings Counties. Many of their relatives and friends reside in these counties, and their attorneys generally have their offices in these counties.

50. Rikers Island is accessible only by automobile, or by a single bus line which runs, at 30 minute headways, from 59th Street and 2nd Avenue in Manhattan through northwest Queens to the Island.

51. Visitors who drive to Rikers Island, other than attorneys, must leave their automobiles on the Queens side of the bridge and await the arrival of the next bus.

52. All individuals visiting plaintiffs must report to a "bridge control building" on Rikers Island. From there they must rely upon Department of Correction buses for transportation to HDM.

53. Administrative delays in the registering of visitors at the bridge control building, transporting of visitors to HDM, and registering of visitors at HDM are extensive. In addition, administrative delays in bringing plaintiffs from their cellblocks to meet their awaiting visitors are extensive.

54. Attorneys frequently wait over an hour from the moment of arrival at Rikers Island to the moment they see the detainee they came to visit; for relatives and friends, the wait is often two or three hours.

55. As a result of the conditions described above in paragraphs 48-54, a visit to HDM generally consumes at least a half-day of the visitor's time and frequently much longer.

56. As a result of the conditions described above in paragraph 48-54, detainees at HDM receive substantially fewer visits from attorneys, relatives and friends than detainees confined at defendants' pre-trial facilities in Brooklyn, the Bronx and Queens, and substantially fewer visits than detainees used to receive at the Manhattan House of Detention (the "Tombs") prior to its closing.

57. Plaintiffs are accorded no more than one, three minute telephone call each week at HDM.

58. As a result of the conditions described above in paragraphs 48-57, plaintiffs are virtually cut off from the outside world at HDM. They are denied adequate opportunity to visit and otherwise speak with their relatives and friends, and are denied adequate access to the attorneys representing them in their pending cases.

VIII

TRANSPORTATION TO AND FROM COURT

59. All members of the plaintiff class are awakened at 5 A.M. every weekday in an effort to have detainees with court appearances transported to court on time.

60. The buses and vans in which plaintiffs are transported to and from court are extremely hot in summer and extremely cold in winter, due to inadequate ventilation and heating.

61. The buses and vans in which plaintiffs are transported to and from court are filthy, as a result of inadequate efforts by defendants to maintain them in sanitary condition.

62. The buses and vans in which plaintiffs are transported to and from court are regularly filled far in excess of their capacities. In the buses several detainees must stand each trip even though they are handcuffed and cannot readily maintain their balance.

63. Detainees often are not returned to HDM following court appearances until 8 P.M. or even later.

64. Plaintiffs who are on trial must endure the arduous trip to and from court several days in a row, as a result of defendants' failure to maintain sufficient detention facilities for overnight housing in the boroughs where plaintiffs' cases are pending.

65. The conditions described above in paragraph 59-64 are injurious to plaintiffs' physical and mental well being, and interfere with their capacity to participate alertly and capably in the defense of their cases in court.

DISCIPLINE

66. Plaintiffs accused of disciplinary infractions are placed in punitive segregation and deprived of all privileges without being accorded the minimum requirements of due process law. In particular plaintiffs are denied:

a. Prior, written notice of the rules of HDM, violation of which may give rise to disciplinary action, and of the range of penalties for each infraction;

b. Written notice of the charges against them and of the possible penalties;

c. The right to be heard by an impartial tribunal;

d. The right to confront and to cross-examine their accusers and any other adverse witnesses;

e. The right to call witnesses;

f. The right to be represented by legal counsel, if available, and otherwise by an adequate substitute therefor;

g. Decisions based solely on eveidence adduced at the hearing; and

h. Written findings of fact and reasons for imposing punishment.

67. Detainees considered to have committed infractions are placed in punitive segregation, denied the right to receive mail or visits (except from counsel), and deprived of commissary privileges, books, personal property, and any opportunity for exercise.

MAIL

68. All mail sent to detainees at MDM is opened and inspected for contraband out of their presence by custodial personnel before being delivered to them.

69. Under defendants' rules, plaintiffs' mail may be read and censored in any instance where defendants deem it necessary for security reasons.

SEARCHES AND DESTRUCTION OF PROPERTY

70. Detainees are routinely subjected to searches of their persons, cells, papers and property.

71. In the course of such searches, plaintiffs' property, including personal and legal papers, often is arbitrarily confiscated, damaged or destroyed by custodial personnel.

72. Plaintiffs are not permitted to observe the searching of their cells by custodial personnel.

73. Detainees whose property is confiscated are accorded neither a receipt nor a statement of reasons why the property was taken.

XII

LIMITATIONS ON PERSONAL PROPERTY

74. Detainees at HDM are not permitted to receive packages of personal effects, except for a limited amount of clothing, from outside the institution.

75. Plaintiffs are not permitted to receive books and other reading matter at HDM except those ordered and shipped directly by a publisher. Access to newspapers and other periodicals is also restricted.

76. Plaintiffs are not permitted to possess typewriters, radios or phonographs in their cells.

77. The limitations on the personal property which plaintiffs may possess are substantially greater than those imposed upon convicted felons at New York State prisons.

XIII

LIVING CONDITIONS

78. Sanitation. (a) HDM is infested with rats, mice and roaches. Kitchen equipment is unsanitary. (c) There are numerous outstanding violations of the New York City Health Code in both kitchen and living areas, including fly and insect infestation of food preparation and storage areas, leaking toilets in cells, and unusable or filthy mattresses, pillows and blankets. (d) Provisions for laundering inmate clothing and bedclothes are inadequate, and plaintiffs are even forbidden to hang wet laundry to dry in their own cells.

79. Personal Hygiene. Detainees are not provided with a sufficient supply of clean towels, and toothpaste. Shower stalls are not kept clean.

80. Food. (a) Meals at HDM are lacking in nutrition, unappetizing, poorly prepared, and regularly served cold, with dirty utensils, under unhygienic conditions. (b) Kitchen and food serving staff do not comply with minimum food sanitation procedures such as washing hands and wearing clean clothing. (d) Dirt, insects, hair, and other foreign matter are often found by plaintiffs in food served to them. (d) Unlike convicts at state correctional facilities, detainees are not permitted to receive food packages from outside the institution to supplement their diet.

81. Noise. The noise levels on the cellblocks at HDM are extremely high, thereby adversely affecting plaintiffs' mental and physical well being.

82. Heat and Ventilation: In winter HDM is very poorly heated, and inmates must wrap themselves in blankets as protection against the cold. In warm weather ventilation is often inadequate.

83. Inhumane Living Conditions: The physical environment in which inmates of HDM are compelled to live is unrelievedly and unnecessarily dismal and depressing, lacking in the modicum of comfort and amenities which basic human decency requires in any facility used for human habitation. In addition to the conditions already enumerated, detainees are subjected to: (a) the presence of unenclosed open toilets in the cells and shower rooms

(b) the use of very thin mattresses on hard steel beds and issuance of torn and inadequate bedding; (c) the lack of hot water; (d) the lack of closets or lockers to hang clothes and store personal belongings; (e) confinement in drab windowless cells with steel walls and bars. Subjection of detainees to such degrading conditions is not required or justified by any reasonable security consideration and evinces a systematic disregard for their rights, as citizens of the United States and persons who must be presumed innocent, to humane treatment and a decent living environment.

84. The living environment for unconvicted detainees at HDM is vastly inferior to that provided for convicted felons in New York State correctional institutions.

85. The conditions and practices described above violate the rights of the plaintiffs and of the class they represent under the First, Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the Constitution of the United States.

a. By failing to adopt the least restrictive and oppressive means of ensuring the presence of the members of the plaintiff class at their trials, and by subjecting plaintiffs, or failing to prevent their subjection, to the conditions described in paragraphs 9 through 84 herein, defendants have unlawfully subjected plaintiffs to punishment and deprived them of liberty without due process of law, in violation of their rights under the Fourteenth Amendment to the Constitution.

b. By the same acts defendants have violated plaintiffs' right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments.

c. By confining plaintiffs under conditions which are damaging to their health and sanity, defendants have violated their right to protection from harm while in state custody, arising under the guarantees of the Eighth, Ninth, and Fourteenth Amendments.

d. The subjection of plaintiffs, who must be presumed innocent and who are detained solely because of their inability to furnish bail, to the conditions described herein, which are more punitive and oppressive than those imposed upon convicted felons in the State of New York, violates their right to equal protection of the laws under the Fourteenth Amendment.

e. Defendants' interference with plaintiffs' marital, parental and personal relationships through their restrictions on plaintiffs' contacts with their wives, families and friends constitutes cruel punishment in violation of their right to due process of law under the Fourteenth Amendment, and violates their right to associate, and to enjoy privacy in their associations, arising from the guarantees of the First, Fourth, Ninth and Fourteenth Amendments.

f. The crowded and indecent conditions under which plaintiffs are kept violate their right to privacy under the First, Fourth, Ninth and Fourteenth Amendments.

g. The arbitrary searches and confiscations of property to which plaintiffs are subjected violate their right to be free from unreasonable searches and seizures under the Fourth Amendment, and their right not to be deprived of their property without due process of law under the Fourteenth Amendment.

h. The practice of reading plaintiffs' mail, and of opening and inspecting their mail out of their presence, violates their right to freedom of speech under the First Amendment, their right to be free from unreasonable searches under the Fourth Amendment, and their right to privacy under the First, Fourth, Ninth and Fourteenth Amendments.

i. The opening and inspection of mail from legal counsel, the courts, the press, and public officials is an infringement of plaintiffs' right to the assistance of counsel under the Sixth Amendment, their right of access to the courts under the Fifth and Fourteenth Amendments, and their right to free expression and to petition the government for the redress of grievances under the First Amendment.

j. The disciplinary procedures followed at HDM violate plaintiffs' right to due process of law under the Fourteenth Amendment.

k. The denial of mail, visits, personal property, and opportunities for recreation to detainees found guilty of institutional infractions constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, deprives them of liberty and property without due process and denies them equal protection of the laws in violation of the Fourteenth Amendment.

1. The demoralizing and debilitating conditions of plaintiffs' confinement, their isolation from their attorneys and other persons in the world outside HDM, the restrictions on visiting and telephone calls, the conditions under which they are transported to and from court, and, for detainees in punitive segregation, the denial of mail and visits, impair plaintiffs' access to the courts and their ability to assist in the preparation of their defenses and defend themselves at trial, in violation of their rights under the Fifth, Sixth and Fourteenth Amendments.

86. Plaintiffs have no other plain, adequate or complete remedy to redress these wrongs; they and the class they represent will continue to suffer irreparable injury from the conditions set forth above unless the injunctive relief sought herein is granted.

WHEREFORE, plaintiffs pray that this Court:

I. Adjudge and declare that the conditions described above are in violation of the rights of plaintiffs and of the class they represent under the Constitution and laws of the United States.

II. Enjoin defendants, their agents and employees, and all persons acting in concert with them, from incarcerating plaintiffs under the unconstitutional practices and conditions that now prevail at HDM.

III. Enjoin defendants from transferring any member of plaintiffs class to any other detention facility where conditions are worse than those at HDM, or which is less accessible to visitors and counsel.

IV. Retain jurisdiction in this cause until the unlawful conditions, practices, policies, acts and omissions alleged herein no longer exist and the Court is satisfied that they will not recur.

V. Grant such other and additional relief as the Court may deem just and proper.

Dated: New York, New York
June 27, 1975

WILLIAM E. HELLERSTEIN
JOEL BERGER
STEVEN A. HERMAN
MICHAEL B. MUSHLIN
Attorneys for Plaintiffs
The Legal Aid Society
Prisoners' Rights Project
15 Park Row
New York, New York 10038

Order to Show Cause.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

JAMES BENJAMIN, et al.,

Plaintiffs,

-v-

BENJAMIN J. MALCOLM, et al.,

Defendants.

- -X

ORDER TO SHOW CAUSE

75 Civ.

Upon the affidavit of JOEL BERGER, Esq., the affidavits of OLIVER MILES, BRUCE HAYES, JAMES BENJAMIN, MIGUEL CALINDEZ, JOSE SALDANA and ROBERT ESCHERT, and the exhibits attached thereto, it is hereby

ORDERED, that defendants or their attorneys show cause on the 11th day of June, 1975 at 4:30 o'clock in the forenoon of that day, at the United States Courthouse, Foley Square, New York, New York, ~~court~~room 1903, why an order should not be entered 1) declaring this case a class action pursuant to F.R.Civ.P. 23(c)(1) and Rule 11A of the Civil Rules of this Court, and providing for notice to the class; 2) permitting plaintiffs to proceed herein without prepayment of fees or costs of security therefor, pursuant to 28 U.S.C.§1915; 3) granting a preliminary injunction, pursuant to F.R.Civ.P. 65, enjoining defendants from a) incarcerating any detainee at the New York City House of Detention for Men without affording him an hour of outdoor exercise each weekday; a minimum of four 30

minute visits weekly, at least one of which shall be at night or on a weekend; contact visits; the option of remaining in his cell during all lock-out periods; and the rules with respect to disciplinary procedures and correspondence set forth in this Court's Amended Judgment of April 23, 1975 and Judgment of March 22, 1974 in Rhem v. Malcolm (70 Civ. 3962), annexed hereto as Exhibit A; and b) soliciting a waiver from any detainee at the New York City House of Detention for Men of the rights accorded to him under said preliminary injunction; and granting such other and different relief as the Court may deem just and proper, and it is further

ORDERED that service of a copy of this order and the papers upon which it is granted upon the Hon. W. Bernard Richland, Corporation Counsel of the City of New York, attorney for defendants, on or before 10 o'clock on the 25 day of June, 1975 shall be sufficient service of this order.

MEJ

UNITED STATES DISTRICT JUDGE

Dated: New York, New York
June , 1975

Affidavit of Joel Berger
in Support of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -X

JAMES BENJAMIN, et al., :

Plaintiffs, :

-v- :

BENJAMIN J. MALCOLM, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - - -X

AFFIDAVIT

75 Civ.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JOEL BERGER, being first duly sworn, deposes and says:

1. I am Assistant Attorney-in-Charge of the Legal Aid Society Prisoners' Rights Project, and am one of the attorneys representing the plaintiff class in the above-titled action.

2. This affidavit is submitted in support of plaintiffs' application for class action status and notice to the class, forma pauperis relief, and a preliminary injunction enjoining defendants pendente lite from a) incarcerating any detainee at the New York City House of Detention for Men without affording him an hour of outdoor exercise each weekday; a minimum of four 30 minute visits weekly, at least one of which shall be at night or on a weekend; contact visits; the option of remaining in his cell during all lock-out periods; and the rules with respect to disciplinary procedures and correspondence set forth in this Court's Amended Judgment of April 23, 1975 and Judgment of March

2, 1974 in Rhem v. Malcolm (70 Civ. 3962), annexed hereto; and (c) soliciting a waiver from any detainee at the New York City House of Detention for Men of the rights accorded to him under this preliminary injunction.

CLASS ACTION

3. This action is brought as a class action under F.R.Civ.P. 23(a) and (b)(1) and (2).

4. The class consists of all persons who are or will be detained in pre-trial detention at HDM.

5. The class consists of over 1400 members, and its membership constantly changes as detainees are newly admitted and discharged daily. Accordingly, joinder of all members of the class is impracticable.

6. The conditions and practices complained of by plaintiffs present questions of law and fact common to all detainees at HDM.

7. Plaintiffs and their attorneys will fairly and adequately protect the interests of the class.

8. The prosecution of separate actions by individual members of the class would create a risk of inconsistent adjudications with respect to each which would establish incompatable standards of conduct for defendants.

9. The defendants have acted or failed to act on grounds generally applicable to all detainees of HDM, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

10. Notice to the class is necessary in order to apprise all HDM detainees of the pendency of the lawsuit and to inform them of their rights under any orders entered by the court.

FORMA PAUPERIS

11. As attested to by the affidavits of plaintiffs annexed hereto, plaintiffs are indigent and unable to provide prepayment of fees or costs or security therefor.

PRELIMINARY INJUNCTION

12. On April 23, 1975, this Court entered a judgment in Rhem v. Malcolm (70 Civ. 3962) establishing certain minimal constitutional standards for the incarceration of pre-trial detainees.

13. The Court determined that the Constitution requires that detainees be afforded: 1) at least one hour of outdoor exercise each weekday; 2) a minimum of four 30 minute visits weekly, at least one of which shall be at night or on a weekend; 3) contact visits; 4) the option of remaining in their cells during all lock-out periods; and 5) various rules with respect to disciplinary procedures and correspondence as set forth in this Court's Amended Judgment of April 23, 1975 and Judgment of March 22, 1974 in Rhem v. Malcolm (70 Civ. 3962).

14. The judgment of April 23, 1975, technically applies only to those detainees of HDM who were formerly housed at the Manhattan House of Detention for Men (the "Tombs") before it was closed by defendants. The reason for entry of this

judgment, set forth in a Memorandum of this Court dated February 20, 1975 (389 F.Supp. 964), was to insure that these detainees would be accorded at HDM the rights to which they would have been entitled at the Tombs under the Court's original decision in Rhem, 371 F.Supp. 594 (S.D.N.Y. 1974), as affirmed by the Court of Appeals. 507 F.2d 333 (2d Cir. 1974).

15. As the affidavit of Oliver Miles and the "waiver" form (annexed thereto) presented to him by defendants clearly demonstrate, defendants have chosen to deprive all HDM detainees except those transferred from the Tombs of the rights established under the judgment of April 23rd.

16. There is no constitutionally permissible basis for denying the rights established by the April 23rd judgment to most detainees at HDM merely because they are not Tombs transferees. Detainees at HDM whose cases arose in Manhattan after the Tombs was closed, or who have been transferred to HDM from defendants' detention facilities in other boroughs, are hardly entitled to any fewer constitutional rights than Tomb transferees.

17. Accordingly, plaintiffs are entitled to preliminary relief in this new lawsuit guaranteeing them pendente lite those rights specified in Paragraph 13 of this affidavit.

18. As further attested to in the annexed affidavit of Oliver Miles, defendants have presented the Tombs transferees at HDM with "waiver" forms relinquishing their rights under the Rhem decision.

19. These "waiver" forms, which do not even delineate the Rhem rights in any detail, were presented to Tombs transferees without notice to myself or any of the other attorneys for plaintiffs in Rhem.

20. There is no reason why any detainee, absent some countervailing pressure by defendants, would want to waive his right to contact visits, more outdoor recreation, optional lock-in, or any of the other constitutional rights established under the April 23rd judgment in Rhem and sought by plaintiffs in the instant motion.

21. In view of defendants' efforts to secure waivers in the Rhem action and thus undermine the Court's April 23rd judgment, it is respectfully requested that the Court enjoin defendants from engaging in such activity with regard to any members of the plaintiff class herein.

22. No prior application has been made for the relief requested herein.

23. Plaintiffs are proceeding by order to show cause on this motion because of defendants' ongoing and continuing violation of their constitutional rights.

Affidavit of Joel Berger.

WHEREFORE it is respectfully requested that this Court grant to plaintiffs the relief requested herein.

JOEL BERGER

Sworn to before me this

day of June, 1975.

Notary Public

STEVEN ALAN HERMAN
Notary Public, State of New York
No. 31-4502875
Qualified in New York County
Commission Expires March 30, 1977

Affidavit of Oliver Miles in Support of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -X

JAMES BENJAMIN, et al.,

Plaintiffs,

-v- AFFIDAVIT

BENJAMIN J. MALCOLM, et al., 75 Civ.

Defendants.

- - - - - - - - - - - - - - - - - - - -X

STATE OF NEW YORK)
: SS.:
COUNTY OF BRONX)

OLIVER MILES, being first duly sworn, deposes and says:

1. I am an inmate of the New York City House of Detention for Men. Prior to being confined here, I was incarcerated at the Tombs. I was transferred to HDM When the Tombs was closed last December..

2. Prior to June 6, 1975, I was located on block 8 of HDM.

3. On June 6, 1975, I was told by Captain Howard that I had to move to block 6. Since I was a block 8 delegate to the inmate council and had a job on the help, I was reluctant to leave. However, I was told that I had to leave because of a court order. At this time, I was not informed of the nature of the court order.

4. That same day, I was moved to the B side of block 6. There were only eight other inmates on the block. Three more arrived on June 9, 1975.

5. On June 12, 1975, Captain Casey arrived on block 6 with the form annexed to this affidavit. The form outlines

503(i)

This Form was brought to be signed by Captain Casey; shield # 320

DEPARTMENT OF CORRECTION
CITY OF NEW YORK
N.Y.C.D.H.H.

Date _____

Name _____ Book & Case # _____

Cell Block _____ Cell # _____

I have been informed by the Administration of this Institution that as a member of the Plaintiff class in the Rhem Case class action regarding the Manhattan House of Detention for Men where I was formerly held, that I am now entitled to certain conditions while incarcerated here such as daily recreation, contact visits, improved correspondance and optional lock-in periods as outlined by the Federal Court.

I donnot wish to participate in any of those conditions.

_____
(signature)

Witnessed by _____

. . . . . .

Name _____ Date _____

I have changed my mind, and now wish to participate in the conditions outlined as a Plaintiff in the Rhem Case.

_____
(signature)

Witnessed by _____

Affidavit of Oliver Miles.

in very general language the conditions required for Tombs transferees under the Rhem case, and contains a space for the inmate to sign a statement that "I do not wish to participate in any of those conditions." I refused to sign the form, as did the other eleven men on block 6B.

6. It is apparent to me from these events that this institution intends to follow the Rhem decision only for Tombs transferees and not for the many other detainees at MDM. The institution is trying to limit even the number of Tombs transferees who benefit from the decision by asking detainees to sign away their rights.

7. I have not yet begun to receive the rights required under the Rhem decision. For example, I have not been allowed to go to the yard some weekdays despite clear weather, and the yard periods I have received have lasted only approximately twenty minutes. I have not been advised of any change in the visiting schedule which would permit me to receive visits every weekend instead of every other weekend.

OLIVER MILES

Sworn to before me this
21st day of June, 1975

Notary Public

Notary Public, State of New York
No. [illegible]
Qualified in [illegible] County
Commission Expires [illegible], 1976

Affidavit of Bruce Hayes in Support of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

JAMES BENJAMIN, et al., :

Plaintiffs, :

-v- :

BENJAMIN J. MALCOLM, et al., :

Defendants. :

- -x

AFFIDAVIT

75 Civ.

STATE OF NEW YORK)
: ss.:
COUNTY OF BRONX)

BRUCE HAYES, being duly sworn deposes and says:

1. I am presently being detained at the New York City House of Detention for Men on Rikers Island (HDM) awaiting disposition of my criminal case.

2. I have read the Amended Judgment of April 23, 1975 in Rhem v. Malcolm, which establishes the minimum constitutional standards under which Tombs transferees at HDM can be held.

3. It is my understanding that those detainees whom the Department of Correction thinks are affected by the April 23rd Judgment have been moved to a special cell block.

4. The rest of us who are detainees just like the people from the Tombs, are not being given the rights set out in the April 23rd Judgment. For example, we can receive weekend visits only every other Sunday, we do not receive an hour of outdoor recreation each weekday, and my legal mail has been opened outside of my presence.

Affidavit of Bruce Hayes.

5. I think that since we are detainees we are entitled at least to all of the rights in the Rhem Judgment of April 23rd.

Bruce Hayes

BRUCE HAYES

Sworn to before me this
21st day of June, 1975.

Notary Public

Affidavit of James Benjamin in Support of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

JAMES BENJAMIN, et al.,

Plaintiffs,

-v-

BENJAMIN J. MALCOLM, et al.,

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

75 Civ.

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF BRONX)

JAMES BENJAMIN, being duly sworn, deposes and says:

1. I am one of the plaintiffs in the above-entitled case and I make this affidavit in support of my motion to proceed in forma pauperis.

2. I am presently detained at the New York City House of Detention for Men on Rikers Island.

3. I believe that I am entitled to proceed in forma pauperis because I lack any funds which would enable me to pay the costs of this proceeding or give security therefor, and I believe that I am entitled to redress.

Affidavit of James Benjamin.

4. The Legal Aid Society, Prisoners' Rights Project by WILLIAM E. HELLERSTEIN, JOEL BERGER and STEVEN A. HERMAN has agreed to represent me without any fee in this proceeding.

James Benjamin

JAMES BENJAMIN

Sworn to before me this
27th day of June, 1975

Notary Public

JOEL BERGER
Notary Public, State of New York
No. 31-4231197
Qualified in New York County
Commission Expires March 30, 1976

Affidavit of Robert Eschert in Support of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

JAMES BENJAMIN, et al.,

Plaintiffs,

-v-

BENJAMIN J. MALCOLM, et al.,

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

75 Civ.

- -X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ROBERT ESCHERT, being duly sworn, deposes and says:

1. I am one of the plaintiffs in the above-entitled case and I make this affidavit in support of my motion to proceed in forma pauperis.

2. I am presently detained at the New York City House of Detention for Men on Rikers Island awaiting disposition of my criminal trial.

3. I believe that I am entitled to proceed in forma pauperis because I lack any funds which would enable me to pay the costs of this proceeding or give security therefor, and I believe that I am entitled to redress.

Affidavit of Robert Eschert.

4. The Legal Aid Society, Prisoners' Rights Project by WILLIAM E. HELLERSTEIN, JOEL BERGER and STEVEN A. HERMAN has agreed to represent me without any fee in this proceeding.

Robert L. Eschert

Sworn to before me this
26 day of June, 1975.

Notary Public

[illegible] New York
[illegible]
Qualified in [illegible] County
Commission expires March 30, 1976

Affidavit of Bruce Hayes in Support of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

JAMES BENJAMIN, et al., :

Plaintiffs, : AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED

-v- : IN FORMA PAUPERIS

BENJAMIN J. MALCOLM, et al., : 75 Civ.

Defendants. :

- -X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

BRUCE HAYES, being duly sworn, deposes and says:

1. I am one of the plaintiffs in the above-entitled case and I make this affidavit in support of my motion to proceed in forma pauperis.

2. I am presently detained at the New York City House of Detention for Men on Rikers Island awaiting disposition of my criminal trial.

3. I believe that I am entitled to proceed in forma pauperis because I lack any funds which would enable me to pay the costs of this proceeding or give security therefor, and I believe that I am entitled to redress.

Affidavit of Bruce Hayes.

4. The Legal Aid Society, Prisoners' Rights Project by WILLIAM E. HELLERSTEIN, JOEL BERGER and STEVEN A. HERMAN has agreed to represent me without any fee in this proceeding.

Bruce Hayes

Sworn to before me this
22nd day of June, 1975.

Notary Public

[illegible]
Notary Public, State of New York
No. [illegible]
Qualified in New York County
Commission Expires March 30, 1976

Affidavit of Miguel Galindez, in Support of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -X

JAMES BENJAMIN, et al., :

Plaintiffs, : AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
-v- : IN FORMA PAUPERIS

BENJAMIN J. MALCOLM, et al., : 75 Civ.

Defendants. :

- - - - - - - - - - - - - - - - - - - -X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MIGUEL GALINDEZ, being duly sworn, deposes and says:

1. I am one of the plaintiffs in the above-entitled case and I make this affidavit in support of my motion to proceed in forma pauperis.

2. I am presently detained at the New York City House of Detention for Men on Rikers Island awaiting disposition of my criminal trial.

3. I believe that I am entitled to proceed in forma pauperis because I lack any funds which would enable me to pay the costs of this proceeding or give security therefor, and I believe that I am entitled to redress.

Affidavit of Miguel Galindez.

4. The Legal Aid Society, Prisoners' Rights Project by WILLIAM E. HELLERSTEIN, JOEL BERGER and STEVEN A. HERMAN has agreed to represent me without any fee in this proceeding.

Miguel Galindez

Sworn to before me this
21st day of June, 1975

Notary Public

JOEL BERGER
Notary Public, State of New York
No. 31-0381[illegible]
Qualified in New York County
Commission Expires March [illegible], 1976

Affidavit of Jose Saldana, in Support of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

JAMES BENJAMIN, et al., :

Plaintiffs, : AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED

-v- : IN FORMA PAUPERIS

BENJAMIN MALCOLM, et al., : 75 Civ.

Defendants. :

- -X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JOSE SALDANA, being duly sworn, deposes and says:

1. I am one of the plaintiffs in the above-entitled case and I make this affidavit in support of my motion to proceed in forma pauperis.

2. I am presently detained at the New York City House of Detention for Men on Rikers Island awaiting disposition of my criminal trial.

3. I believe that I am entitled to proceed in forma pauperis because I lack any funds which would enable me to pay the costs of this proceeding or give security therefor, and I believe that I am entitled to redress.

Affidavit of Jose Saldana.

4. The Legal Aid Society, Prisoners' Rights Project by WILLIAM E. HELLERSTEIN, JOEL BERGER and STEVEN A. HERMAN has agreed to represent me without any fee in this proceeding.

José Saldaña

Sworn to before me this
27th day of June, 1975.

Notary Public

JOEL BERGER
Notary Public, State of New York
No. 31-0281197
Qualified in New York County
Commission Expires March 30, 1976

Exhibit A, Amended Judgment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

JAMES RHEM, ROBERT FREELY, LEO ROBINSON, and EUGENE NIXON, individually and on behalf of all other persons similarly situated,

Plaintiffs,

-against-

70 Civ. 3962

BENJAMIN J. MALCOLM, Commissioner of Correction for the City of New York; ARTHUR RUBIN, Warden, Manhattan House of Detention for Men; ABRAHAM D. BEAME, Mayor, City of New York; PETER PREISER, Commissioner of Correction of the State of New York; HUGH CAREY, Governor, State of New York; and OWEN McGIVERN, Presiding Justice, New York State Supreme Court, Appellate Division, First Department, individually and in their official capacities,

AMENDED JUDGMENT

Defendants.
----------X

This action having been tried by this court, Honorable Morris E. Lasker presiding, and the court having made and filed findings of fact and conclusions of law dated January 7, 1974, and having filed an order July 11, 1974; and the Court of Appeals by decision dated November 8, 1974 having affirmed this court's findings of fact and conclusions of law as to the unconstitutionality of conditions at the Manhattan House of Detention for Men (the Tombs), and having remanded for further consideration of the remedy to be provided; and the City defendants having terminated the use of the Manhattan House of Detention for the custody of any

Exhibit A.

members of the plaintiff class and having transferred to the House of Detention for Men at Rikers Island, members of the plaintiff class who were, up to the time of transfer, in custody at the Manhattan House of Detention; and

Plaintiffs having presented a proposed judgment intended to insure that inmates transferred from the Manhattan House of Detention for Men are afforded treatment at the House of Detention for Men on Rikers Island consistent with the findings set forth in the court's opinion of January 7, 1974; and

The court having visited the House of Detention for Men on Rikers Island in the company of the parties and counsel and having heard testimony and taken evidence on the 10th, 13th and 30th days of January, 1975, to determine the applicability of the court's prior rulings regarding the issues of contact visits, visiting schedules, inmate classification, lock-out time and optional lock-in, to the House of Detention for Men at Rikers Island, and having considered the evidence presented and upon all the pleadings had herein, it is hereby

ORDERED, ADJUDGED and DECREED that defendants, their agents and employees and all persons acting in concert with them be and hereby are permanently enjoined from incarcerating any detainee who is a member of the plaintiff class and is currently housed at the House of Detention for Men at Rikers Island, except under the following conditions:

Exhibit A.

1. Classification

Within ninety days of the entry of this judgment, defendants shall establish a classification system for purposes of implementing paragraphs 2(b) and 4(b) below.

2. Right to Leave Cells

(a) Within sixty days of the entry of this judgment, defendants shall permit plaintiffs to leave their cells at all times except for such reasonable periods as may be necessary to conduct counts of the population, clean the institution, arrange for court appearances, provide meals to inmates and provide a quiet sleeping period of no longer than eight hours, starting no earlier than 9:30 P.M.

(b) Defendants, upon establishing the classification system referred to in Paragraph 1 of this judgment, may impose a more restrictive lock-in schedule upon selected detainees in instances where defendants can establish, based upon said classification system, that implementation of subparagraph (a) of this paragraph would jeopardize institutional security.

3. Optional Lock-in

(a) Within sixty days of the date of entry of this judgment, defendants shall commence a program of optional lock-in during activity periods in two cell blocks chosen by the Warden of the House of Detention for Men at Rikers Island. Inmates in such cell blocks choosing to remain locked in their cells during activity periods shall have the option to do so.

Exhibit A.

(b) In the event that upon the expiration of thirty days after the commencement of such expanded optional lock-in the Warden of the House of Detention for Men at Rikers Island determines that it is not practical or feasible to extend such optional lock-in to all the members of the plaintiff class, he shall report to the court in writing his reasons for such a conclusion, furnishing a copy of such report to the attorneys for the plaintiffs. Within ten days thereafter counsel for the plaintiffs shall respond in writing to the court furnishing a copy of their response to attorneys for the defendants. Thereafter, the court will determine whether the program of expanded optional lock-in shall be eliminated, further tested or applied to all members of the class within the institution.

(c) Unless the Warden of the House of Detention for Men at Rikers Island shall timely furnish the court with the report referred to in the previous paragraph, then upon the expiration of the sixtieth day after the commencement of such expanded optional lock-in, all members of the plaintiff class shall be entitled to and receive such expanded optional lock-in.

(d) At the option of the defendant, Commissioner of Corrections for the City of New York, may commence the expanded optional lock-out program specified in sub-paragraph (a) above simultaneously in all cell blocks of the House of Detention for Men. Whether the Commissioner exercises the

option provided in this sub-paragraph (d) or not, the procedures specified in sub-paragraphs (b) and (c) above shall be followed.

4. Contact Visits

(a) Within ninety days of the entry of this judgment all personal visits accorded plaintiffs shall be contact visits.

(b) Defendants, upon establishing the classification system referred to in Paragraph 1 of this judgment, may deny contact visits to selected detainees in instances where defendants can establish, based upon said classification system, that contact visits would jeopardize institutional security.

5. Visiting Schedule for Personal Visits

(a) The visiting schedule for personal visits shall be arranged to assure each member of the plaintiff class a minimum of one weekly visit at night or on a Saturday or Sunday. Every visit shall last a minimum of one-half hour and shall not then be terminated unless the visiting facilities are filled to capacity and additional visitors are waiting, in which case those visits which have lasted the longest in excess of the minimum shall be terminated first.

(b) The present number of visiting hours per week shall not be reduced.

Exhibit A.

6. Recreation

Defendants shall forthwith and no later than June 1, 1975 take all steps necessary to employ such additional correctional personnel as is necessary to afford every detainee a period of one hour outdoor exercise, Mondays through Fridays inclusive, except in inclement weather. Defendants shall permit detainees to possess warm outer garments and shall provide warm outer garments to indigent detainees to facilitate outdoor recreation in cold weather.

7. Discipline

The provisions of Paragraphs 4 and 5 and Schedule A of this court's judgment of March 22, 1974 shall be observed by defendants in respect to all members of the plaintiff class except to the extent stayed by this court's order of July 31, 1974.

8. Correspondence

The provisions of Paragraphs 1-3 of this court's judgment of March 22, 1974 shall be observed by defendants in respect to all members of the plaintiff class.

Dated: New York, New York
April 23, 1975.

U.S.D.J.

Judgment, Hon. Morris E. Lasker, entered March 22, 1974.

U.S. DISTRICT COURT FILED MAR 21 1974 S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

JAMES RHEM, ROBERT FREELY, LEO ROBINSON and EUGENE NIXON, individually and on behalf of all other persons similarly situated,

Plaintiffs,

-against-

BENJAMIN J. MALCOLM, Commissioner of Correction for the City of New York; PETER SCHAEFER, Warden, Manhattan House of Detention for Men; ABRAHAM D. BEAME, Mayor, City of New York; PETER PREISER, Commissioner of Correction of the State of New York; MALCOLM WILSON, Governor, State of New York; and OWEN McGIVERN, Presiding Justice, New York State Supreme Court, Appellate Division, First Department, individually and in their official capacities,

Defendants.

70 Civ. 3962

JUDGMENT

Lasker

- -X

ENTERED MAR 21 1974

This action came on to be tried before the Court, Honorable Morris E. Lasker, District Judge, presiding, and the issues having been duly tried, and the Court having made and filed findings of fact and conclusions of law, all dated January 7, 1974, and the Court expressly determining that there is no just reason for delay in the entry of final judgment as to the issues of correspondence and discipline, visiting scheduled and attachments it is hereby

ML

ORDERED, ADJUDGED and DECREED that defendants Malcolm, Schaefer and Beame, and their agents and employees, be and hereby are enjoined from:

Judgment.

1. Reading any incoming mail addressed to plaintiffs from any court, attorney or public official, or any employee thereof acting in an official capacity;

2. Opening any incoming mail addressed to plaintiffs from any court, attorney or public official, or any employee thereof acting in an official capacity, except in the presence of the addressee;

3. Refusing to deliver to plaintiffs any book, periodical or other reading material on the ground that it has not been sent directly from a publisher; provided, however, that nothing contained in this paragraph shall prohibit defendants from inspecting for contraband said book, periodical or other reading material in order to protect the security of the institution.

4. Subjecting plaintiffs to any punishment for any disciplinary infractions without first according plaintiffs institutional hearings in accordance with the procedures set forth in Schedule A, annexed hereto;

5. Depriving plaintiffs found guilty of institutional infractions of the right to receive visitors and send and receive mail; and it is further

ORDERED, ADJUDGED and DECREED that, it appearing that further evidence is necessary to determine an appropriate program of contact visiting, and of the hours of visiting, numbers of visitors and days upon which visiting should occur, a hearing will be held by the Court on the 27 day of March, 1974, at 10 AM in Room 619 of the Court House at which the testimony of witnesses presented by the parties shall be taken and any relevant evidenced considered; and it is further

Judgment.

ORDERED, ADJUDGED and DECREED that defendants Malcolm, Schaefer and Beame shall submit to the Court and counsel for plaintiffs within thirty (30) days of entry of this judgment a comprehensive and detailed plan for the elimination of all conditions and practices declared to be in violation of the Constitution of the United States by the Court's opinion of January 7, 1974 as to which final judgment has not been entered herein; and it is further

ORDERED, ADJUDGED and DECREED that within thirty (30) days of submission of the above-mentioned plan, counsel for plaintiffs shall submit to the Court and to counsel for defendants any objections or comments thereto.

Dated: New York, New York
March 19th, 1974.

Morris E. Lasker
MORRIS E. LASKER, U.S.D.J.

Judgment entered this
22nd day of March, 1974.

Raymond F. Burghardt
CLERK

Schedule A, Disciplinary Procedures for the Manhattan House of Detention for Men.

SCHEDULE A

DISCIPLINARY PROCEDURES
FOR THE MANHATTAN HOUSE
OF DETENTION FOR MEN

In addition to according the accused all rights guaranteed under Rule 4.49 of the Rules and Regulations of the Department of Correction of the City of New York, the following procedures shall be followed:

1. Notice

No later than thirty-six (36) hours prior to any institutional disciplinary hearing, the accused shall be given a written notice stating:

a) the precise institutional rule allegedly violated;

b) a summary of the factual allegations upon which the charge is based;

c) the maximum penalty which may be imposed should the accused be found guilty of the infraction;

d) the date and time when a disciplinary hearing will be held; and

e) all rights which the accused will have in the disciplinary proceeding, as set forth herein.

2. Hearings

At all institutional disciplinary hearings, the accused shall have the right to:

a) call witnesses in his own behalf; and

b) confront and cross examine all individuals who have given information adverse to him.

Schedule A.

3. Counsel or counsel-substitute.

The accused shall have the right to be represented by counsel, or if he so elects, counsel-substitute in all disciplinary proceedings where

a) The charge is one which may be punished by punitive segregation or loss of physical exercise periods, or which may be disclosed to the sentencing court in a criminal case, and the accused either seriously disputes the charge or states that he has substantial mitigating factors to present; or

b) There will be difficulty in presenting a defense because of the complexity of the charge or because the accused appears incapable of speaking effectively for himself; or

c) The charge describes an act which constitutes a crime.

"Counsel substitute" may include any law student or law school graduate awaiting the result of a bar examination and, where neither a member of the bar, law student or law school graduate is reasonably available, may include a fellow inmate.

4. Hearing Officer

The individual presiding at the disciplinary hearing shall be impartial and shall not have taken part in any prior investigation of the charge.

5. Written Findings and Reasons

Within twenty-four (24) hours of the conclusion of every disciplinary hearing at which an inmate is found guilty of an infraction, the hearing officer shall prepare and give to the inmate a written statement setting forth findings of fact and reasons for the decision.

Plaintiff's Supplementary Affidavit for a Preliminary Injunction.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

JAMES BENJAMIN, et al., :

Plaintiffs, :

-v- : SUPPLEMENTAL AFFIDAVIT

BENJAMIN J. MALCOLM, et al., :

Defendants. :

- -X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JOEL BERGER, being first duly sworn, deposes and says:

1. This affidavit is submitted to supplement my affidavit of June 24, 1975 in support of plaintiffs' motion for a preliminary injunction in this action.

2. At our conference of July 2, 1975, defendants' counsel requested that this Court conduct a hearing on the motion for a preliminary injunction.

3. This Court has already conducted a comprehensive hearing on each and every item of substantive relief requested by the instant motion, as part of the final stages of Rhem v. Malcolm (71 Civ. 3962) in January of this year. Based upon that hearing and the Court's own tour of HDM at that time, the Court has already entered a judgment establishing all of the relief requested by this motion as requisites of the United States Constitution.

Plaintiff's Supplementary Affidavit.

4. Defendants' request for yet another hearing is nothing more than a delaying tactic to further forestall implementation of constitutional rights declared long ago by this Court. For example, the arguments on optional lock-in presented by defense counsel at the July 2nd conference and by Commissioner Malcolm's affidavit (¶10) are identical to those presented in the January proceeding and repeated in defendants' motion to amend the final Rhem judgment. They have twice been rejected by this Court. See 389 F.Supp. 964, 969 and Memorandum of April 23, 1975, pp.8-9.

5. Plaintiffs respectfully submit that they are entitled to the Rhem rights now, not after a protracted hearing later this summer which merely repeats testimony previously heard by this Court. The final Rhem judgment establishes such an overwhelming likelihood of success on the merits that any further delay in according plaintiffs these long-anticipated rights is unconscionable.

6. Furthermore, this Court need not conduct a hearing to determine plaintiffs' equal protection claim. The Court may enjoin as a matter of law defendants' arbitrary discrimination between Tombs transferees and other HDM detainees with regard to the rights at stake on this motion.

7. The urgency of plaintiffs' prayer for immediate relief is underscored by the Board of Correction's recent finding that a riot is imminent at HDM:

Plaintiff's Supplementary Affidavit.

...the situation is critical and deteriorating. It is, in our judgment, the most serious and potentially explosive prison atmosphere to exist in New York City in recent years. If potentially tragic problems are to be avoided, changes should be implemented before the expected summer upsurge in arrests and tensions multiply existing difficulties.

* * *

To defuse this tense and dangerous situation, a number of immediate and longer-range steps should be undertaken. We are convinced that decisive action, taken now, can turn the situation around and break the mutually- reinforcing chain of events that is currently sweeping HDM toward a major crisis. Paramount among the actions the Board recommends are:... 3. Federal court-mandated changes in visiting procedures, classification, and the provision of outdoor recreation should be implemented on schedule.

* * *

...we are aware that some of the steps we have suggested will cost money at a time when so many municipal workers face layoffs. We are also convinced, however, that the alternative -- a steadily deteriorating situation on Rikers Island -- will prove to be more expensive in both dollar and human terms. Memories of past prison tragedies are too painful -- particularly in this State -- for any of us to ever want to see their like again.

(The Board's full statement and accompanying Report on HDM are annexed hereto).

Plaintiff's Supplementary Affidavit.

WHEREFORE it is respectfully requested that plaintiffs' motion for preliminary relief be granted forthwith.

JOEL BERGER

Sworn to before me this
3rd day of July, 1975

Notary Public

Press Release Annexed to Foregoing Affidavit.

BOARD OF CORRECTION
51 Chambers Street

City of New York

PRESS RELEASE

Contact: Marc Rosen
(212)964-6307 (office)
(212)877-5777 (home)

For Release
Monday, June 30, 1975
6:00 p.m.

CORRECTION BOARD ISSUES REPORT
ON THE NEW YORK CITY HOUSE OF DETENTION FOR MEN
ON RIKERS ISLAND

Peter Tufo, Acting Chairman of the City's Board of Correction, announced today that the Board was releasing its recently completed report to the Mayor on conditions at the New York City House of Detention for Men (HDM) on Rikers Island.

In commenting on the release, Mr. Tufo said:

"For the past several months, amid recurrent rumors of serious tension and unrest, the Board of Correction has been investigating conditions at the New York City House of Detention for Men (HDM) on Rikers Island. Having completed that study, we must report that the situation is critical and deteriorating. It is, in our judgment, the most serious and potentially explosive prison atmosphere to exist in New York City in recent years. If potentially tragic problems are to be avoided, changes should be implemented before the expected summer upsurge in arrests and tensions multiply existing difficulties.

Press Release.

"We have detailed our findings and recommendations at some length in the accompanying report. In summary, the facts are these.

--The institution is overcrowded. Large numbers of inmates are doubled-up, sharing small cells built for one man. The total population is averaging 50% more than a year ago and exceeds usuable single cell capacity by over 10%.

--Tensions among inmates and between inmates and staff are dangerously high. A statistical breakdown of reported incidents shows a 70% increase in challenges to authority, a 43% rise in inmate assaults on other inmates, and a 533% increase in assaults on officers for the first quarter of this year compared to a year ago.

--There are serious shortages in the required number of institutional personnel forcing those who remain to work punishing, expensive and ultimately counter-productive overtime tours.

--Correction officer morale is dangerously low. The number of officers calling in sick rose 238% in the first quarter of 1975; more than 70% of the correction staff has requested transfers to other institutions.

--The provision of services to inmates -- medical care, visiting privileges, access to telephones, attorney contacts, recreation, education and other program opportunities -- is well below desirable levels and, in several cases, is potentially in violation of existing court orders.

--The institution's physical plan is outmoded and unsuited to the needs of a tension-filled, detainee population. The most serious among many flaws is the housing of detainees in large, undivided, three-tier blocks often containing close to 300 inmates under the direct supervision of, at best, four, often only two correction officers."

Mr. Tufo went on to state,

"We have conducted this study in cooperation with the new warden at HDM, Arthur Rubin, and with Department of Cor-

rection executive personnel. Our findings do not indicate that the current situation has resulted from neglect or indifference on the part of Warden Rubin or Commissioner Malcolm, but that, for the most part, the problems have resulted from events beyond their capacity to control.

"To defuse this tense and dangerous situation, a number of immediate and longer-range steps should be undertaken. We are convinced that decisive action, taken now, can turn the situation around and break the mutually-reinforcing chain of events that is currently sweeping MDM toward a major crisis. Paramount among the actions the Board recommends are:

1. The establishment of a ceiling on MDM's inmate population at a level not to exceed the available single-cell capacity of the institution.

2. The immediate transfer of sufficient custodial and civilian personnel from other institutions to reduce compulsory overtime to a level no greater than that which existed prior to the transfer of Tombs inmates to MDM and which is on a par with other City detention institutions. Civilians should be employed, whether on City or CWA lines or as volunteers, to replace correction officers on cellblock phone duty and take over clerical responsibilities now handled by officers.

3. Federal court-mandated changes in visiting procedures, classification, and the provision of outdoor recreation should be implemented on schedule.

4. Changes in MDM's physical structure included in the Department of Correction's C-98 Capital Budget program should, where at all feasible, proceed on an emergency basis.

Press Release.

5. State funds should be sought to reimburse the City for the cost of custody of the thousands of detainees awaiting trial in State courts. It should be noted that the State Charter Revision Commission recently recommended that the State take over total funding responsibility for the City prisons.

6. A number of other physical and procedural alternatives detailed in the Board's report should be instituted as rapidly as possible.

"Since this report was submitted to the Mayor, the situation at HDM, and indeed in the entire City correction system, has worsened. Budget cuts have forced the closing of two City prisons, the Adolescent Detention Center, which is already shut down, and the Bronx House of Detention for Men, which is to be closed at the end of this week. When this reduction in housing capacity is coupled with the usual rise in the number of detainees expected during the summer months, critical overcrowding will be created not only at HDM but in the other City detention facilities as well. Correction Commissioner Malcolm has estimated that overcrowding at the level which preceded the 1970 riots is likely to result from the proposed budget cutback.

"These estimates, moreover, do not take into account anticipated cutbacks in the court system, including the closing of a number of Supreme and Criminal Court trial and arraignment parts, which will further delay the disposition of detainees' cases and substantially increase inmate population.

"These additional factors add further urgency to the Board's recommendations."

Press Release.

In closing, Mr. Tufo noted that,

"While a number of these recommendations do not require new spending, we are aware that some of the steps we have suggested will cost money at a time when so many municipal workers face layoffs. We are also convinced, however, that the alternative -- a steadily deteriorating situation on Rikers Island -- will prove to be more expensive in both dollar and human terms. Memories of past prison tragedies are too painful -- particularly in this State -- for any of us to ever want to see their like again."

# # # # #

The nine-member Board of Correction, appointed by the Mayor, is charged under the City Charter with inspecting City prisons, evaluating the performance of the Department of Correction, and making recommendations to the Mayor and the Commissioner of Correction. In addition to Mr. Tufo, members currently include Barry H. Gottehrer, J. Kenneth Jackson, Wilbert Kirby, the Rev. Louis J. Rios, David A. Schulte, Jr., Rose M. Singer, and the Rev. Mannie Lee Wilson.

# # # # #

A copy of the report is attached.

Board of Correction, Report, Annexed to
Foregoing Affidavit.

C I T Y O F N E W Y O R K

Board of Correction

Report on the New York City House of Detention for Men

June 1975

Peter Tufo, Acting Chairman
Barry H. Gottehrer
J. Kenneth Jackson
Wilbert Kirby
Reverend Louis J. Rios
David A. Schulte, Jr.
Rose M. Singer
Reverend Mannie Lee Wilson

Board of Correction Report.

Report on the New York City House of Detention for Men

After the "Tombs" was closed in December 1974, Manhattan detainees were transferred to the New York City House of Detention for Men ("HDM") on Rikers Island, adding hundreds of inmates to its population. The HDM, designed and constructed as a penitentiary to house sentenced inmates, was already housing more pre-trial detainees than any other facility* in the City.

In view of recurring reports of complex and deep-seated problems stemming from the increased strain upon the institution, the Board of Correction undertook a study of conditions at HDM over the last few months to learn how HDM was responding to these pressures. The Board monitored the facility from March 18 to the present, visiting at different times of the day and night, spending many hours in on-site observations and in discussions with the institution's personnel, inmates and clergy volunteers. Our review over this period revealed even more serious problems than we originally suspected.

* The HDM was built in 1933 and originally named the New York City Penitentiary. It was intended to house adult and adolescent misdemeanants who had already been sentenced for their crimes.

Board of Correction Report.

The following statistics give some sense of present conditions:

-HDM's total population for the first quarter of 1975 is 50% greater than for the corresponding period of 1974. On a typical recent day the inmate population was 112% of usable, single-cell capacity.

-The average number of officers calling in sick rose 238% between the last quarter of 1974 and the first three months of this year.

-More than 70% of the staff have requested transfers to other institutions.

-There has been a 533% increase in reported assaults on officers by inmates during the first quarter of 1975 as compared to a year earlier and a 70% increase in challenges to authority.

Although these figures highlight the urgency of the situation, they really identify only some of the symptoms. After extensive observation and consultation with Departmental and institutional personnel, the Board has determined that the following problems are primary contributing factors to increased tensions.

1) excessive overcrowding creating an environment that is in a perpetual state of emergency

2) a personnel shortage that results in low officer morale, excessive overtime and the provision of minimal institutional services;

3) an outmoded and inappropriate institutional layout creating hazards to correction officers' safety and discouraging the delivery of services.

1. Overcrowding

There is common agreement among correctional experts that overcrowding is the single most significant contributor to inmate unrest and an increase in institutional tensions. Nevertheless, the HDM is overcrowded.

For example, for the week of June 3-8, 1974, there was an average inmate population of 1036; for the week of January 20-24, 1975, there was an average census of 1541 inmates. On April 16, 1975, a typical day since the addition of Tombs inmates to the institution, the population was 1466; the institution's total single-cell housing capacity was 1879. While these figures suggest that the institution is operating under capacity they are, in fact, grossly misleading. One and a half cell-blocks of a total of eight are presently undergoing renovation, making 360 cells unavailable. In addition, separate cellblock sections are reserved for special classes of inmates who are housed apart from the "general population", (inmates awaiting disciplinary action, high

security risks, "notorious" persons in need of protective custody, homosexuals, special observation cases, those awaiting transfer to the methadone detoxification center, and those being held in punitive segregation.) These special sections, though necessary, often contain cells which are unoccupied but cannot properly be considered in the computation of available capacity. Finally, within each cellblock, there are almost always several inoperable cells in need of repair.

When these factors are taken into account, the actual single housing capacity is reduced dramatically. On April 16, 1975, the effective institutional single-cell capacity was only 1312. Thus, inmate population was actually 112% of effective capacity. On that day almost a quarter of the institution's population, 316 inmates, were doubled-up, two to a 5' by 8' cell, leading to inevitable increases in tension.

Overcrowding is a serious problem in any prison, however, the special circumstances of the HDM make it worse.

First, the inmates are detainees, men still presumed to be innocent and awaiting trial. They are being held for months at a time, uncertain about what will eventually happen to them, virtually cut off from family, friends, jobs, and community. Their situation is further exacerbated by the difficulty of access of Rikers Island to family and lawyers.

Report.

Second, HDM's building is particularly unsuited to an overcrowded, detainee population. Because of the layout, it is not uncommon to find a block holding close to 300 inmates.* Indeed, Commissioner Malcolm recently informed the Board that several weeks ago, one block contained 338 inmates. This is in contrast to housing areas at comparable City institutions which contain no more than 48 inmates.

What this means in practical terms is that for 10 1/2 hours a day during the four "lock-out" periods a crowd of up to 150 inmates are milling around on the ground floor on each side of a cellblock, under the supervision of only one correction officer. The officer is neither armed nor separated from the inmates by a catwalk or observation post. In addition to the number of inmates, the layout of each cellblock renders supervision of the inmates even more difficult. Each block is divided into an "A" and "B" side (left and right; the cells are, in effect, back to back). Each side consists of three tiers (rising from the ground floor like a 1930's prison movie scene), and each is approximately 80 yards long. During the lock-out period, the officer is required to make an initial patrol of each tier to see that all inmates are locked-out of their cells.

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* If all cells are operable each cellblock at HDM has the capacity to house 240 inmates in single cell occupancy.

Thereafter, all inmates are required to remain on the ground floor and in the dayroom. Even if there were not a ratio of at least 120 inmates per officer, the task of overseeing this huge area would in itself prove formidable for the one officer assigned. It is almost impossible for him to see or hear all that is going on or to cover the distances involved quickly enough to intervene in a confrontation at the other end of the cellblock, even if he is aware of the problem and is not fearful of exercising his authority.

It is predictable that, in these circumstances, the routine annoyances and irritations endured daily by both inmates and staff must be increased and intensified and the "boiling point" of all concerned substantially lowered. This correlation between overcrowding and increased tension is manifested in more defiant and sometimes violent behavior by inmates. Working in cooperation with institutional personnel, the Board analyzed daily infraction reports for the first quarter of 1975. The infractions were separated for analysis into three categories: 1) challenge to authority; 2) inmate assaults upon other inmates; and 3) inmate assaults upon officers.

The following table shows the frequency of occurrence, as reported, of each type of infraction within the two time periods, adjusted for the increase in population levels:

	Total for Period of Jan. 1974 - March 1974	Total for Period of Jan. 1975 - March 1975	Adjusted Ratio of 1975 Incidents to 1974 Incidents
*Challenge to Authority	198	513	1.72:1
Inmate Assault Upon Inmate	27	58	1.43:1
Inmate Assault Upon Officer	3	24	5.33:1

A further problem is that the conditions which promote tension and unrest also serve to erode institutional discipline. For example confinement in the punitive segregation area (the "bing"), the usual sanction for inmate misconduct, is no longer perceived by the inmates or officers as a form of punishment. The Board was advised by the institutional staff that because these inmates are held in separately isolated facilities, they are able to place more phone calls, receive more food, and generally are subjected to a less crowded and significantly quieter environment than prisoners housed in the general population cellblocks.

II. Severe Shortage in Custodial Staff

Lack of personnel is a major impediment to the orderly administration of HDM. According to Arthur Rubin,

* This includes such incidents as refusals to transfer to other institutions, threatening correction officers, refusal to leave cells, refusals to be searched, or verbal abuse of staff, as defined by the institutional administration.

Report.

Warden of the institution, HDM's officer quota as established by the Department's Operations Division calls for 318 officers. However, as a result of recent attrition and austerity cutbacks, the institution has less than 30% officers assigned to it. Moreover, under present budget plans, the institution's officer quota will be diminished further by the loss of an additional 26 officers on June 30, 1975.

The inevitable result is increased overtime. Since the Department of Correction assigns officers to fixed posts that require coverage, and because the Department has been chronically understaffed over the years, any openings in the schedule must be filled from among those who have already completed a day's work. The shortages at HDM would necessitate substantial overtime even if all available officers reported for work on schedule. But, the staff has been further reduced by a drastic increase in the number of officers calling in sick.

During the last quarter of 1974, the average number of officers absent daily was 5.00. In the first quarter of 1975, the number was 13.66. Even after adjusting for the increased staff level, the figures still reveal an unusual 238% rise in the absentee rate. When an officer calls in sick, it is necessary to require an officer going off duty to work an extra four to eight and one-half hours. As a result, officers at the HDM frequently

end up with only one day off a week, and work two and sometimes three extra shifts per week.

This mandatory overtime affects both the officer's family life and his performance on the job. "It's hard to expect someone to be responsive to human needs when you take an officer's pass day away," declared a captain. Similarly, one officer who has been assigned to HDM for nine years asserted that "95% of the correction officers come to do their job, but not when they have to work another eight-hour tour." Commenting further, the officer declared that "morale was bad among officers....It's getting to a point [where]...I know people who are damn good,...are beginning to slack off, especially when you take away their pass days."

The officers' less than enthusiastic attitude was exhibited in the early hours of April 4, immediately after an escape from the New York City Correctional Institution for Men ("CIFM"). Several men who had just completed the 4 p.m. - midnight shift were recalled to participate in the search for the escapee. Having just worked for eight and one-half hours, the officers were reluctant to return; many refused to "suit up."

Before condemning the officers' conduct, however, their working conditions must be considered. After having worked for eight and one-half hours in the cellblocks, where they were bombarded with requests

by frustrated and irritated inmates, it is only natural that they needed a respite. Furthermore, many of the officers had probably worked extra shifts as recently as a day or two prior to April 4.

Testimony from correctional experts, findings by Federal judges, and common sense all lead to the conclusion that when an officer has to work 17 straight hours, it is unreasonable to think that he will be able to perform his job effectively or enthusiastically. Indeed, in many respects it is detrimental to the operation of the institution to force an officer who is already tired from his normal work day to work an additional tour. He is likely to be tense and frustrated, and his capacity to relate maturely to a hostile or aggressive inmate may be reduced to the flash point. Moreover, since he is more likely to overreact to possible danger than his fresher colleagues, his fatigue can pose risks to inmates or other officers who must count upon him for their personal safety and well-being. Finally, it stands to reason that he will be less responsive to human needs and concern, and will not be as effective as when he is rested.

In addition to the increased work load, the personnel shortages have required officers to assume greater personal risk.

Report.

In an uncrowded block, it is difficult enough to discern the activities of people at the other end. When more than 120 inmates are locked out of their cells, congregating on the ground floor, the cellblock officer is often completely out of the view of the "A" officer. An officer simply cannot function properly if he is afraid of being assaulted. It is unreasonable for those in authority to assume that he can. Even though assaults upon officers are relatively rare, the officers' fears are significant. In such circumstances perceptions govern, rather than reality.

All of these pressures have had the inevitable result of significantly depressing officer morale. An extremely low level of morale among the correction officers was observed throughout the Board's monitoring of the HDM. Many officers spoke candidly to the Board of their frustrations with their jobs, their fears for their own security, the conditions under which they must work, and the forced overtime with which they are faced.

The best indicator of the HDM's unpopularity among the officers is the number of transfer requests. By March 17, 1975, 70% of the correction staff had submitted such requests. This high percentage reveals not only discontent with the HDM, but also the comparative working

conditions of other institutions. Warden James Thomas (who served as HDM's Warden until March 19, 1975) informed the Board that in institutions other than the HDM, the officers receive their regular two pass days, and usually work only one extra shift per week. The HDM staffs' awareness of these differences must necessarily contribute to their low morale.

In addition, the personnel shortages and working conditions at HDM have resulted in a direct curtailment of services available to inmates, adding to their tensions. Medical care, visits, the availability of education and other programs and access to telephones have all been adversely affected. For instance, there is only one officer at the institution assigned to pick up inmates for medication. The Warden has been compelled to transfer an officer from another post to aid in the pick-ups. Even with two officers, medication begins early in the morning and frequently runs late into the evening, particularly when as many as 500 inmates may require medication. As a result, some inmates do not receive attention.

According to the recently appointed unit manager* of the Prison Health unit at the HDM, Meredith Conti,

* The unit manager is the prison health employee designated to oversee the orderly operation of the medical health unit at the institution.

there are two daily sick calls at the institution, one on the 8:00 a.m. - 4:00 p.m. tour and one on the 4:00 p.m. - 12:00 midnight tour. On most cellblocks, two officers go to the block and announce sick call for any inmate who wishes to go to the clinic. The officer also reads off the names on the "hold-in sheet", i.e., the list of inmates whom a physician wants to see again. Ms. Conti declared that only about 40% of the inmates on the hold-in list respond and go to the clinic.

If an inmate complains of illness during the night, the officer on duty must escort him to the clinic (which is virtually impossible unless there is a relief officer) or tell the inmate to wait until morning.

A major problem with the sick call procedure is that unless an inmate presents himself when sick call is announced, he will probably never see the medical staff. Ms. Conti suspects that while certain more vocal inmates frequent the clinic whether they need it or not, the reclusive inmates may be the ones with more serious medical needs.

Every officer consulted declared that it is simply impossible under existing conditions in the cellblocks, for one person to meet all the requests for assistance, including those for medical help. Officers told the board that on most days, only 25-30% of inmates' problems can be dealt with, leaving the vast majority at best unsatisfied, disgruntled, and annoyed.

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Visiting at HDM

The visiting procedure is seriously hindered by the lack of personnel. Two officers are required to pick up and escort inmates to the visiting area. Warden Thomas declared that visitors frequently must wait four or five hours before an inmate is brought to the area. Inmates told the Board that many of their friends and relatives are reluctant to make visits because of the long wait.

The use of the HDM Visiting Room by an abnormally large number of inmates places further stress upon the already strained institutional operation. The N.Y.C. Adolescent Detention Center ("ADC"), which adjoins the HDM, does not contain a Visiting Room. ADC inmates use the HDM Visiting Room during the evening and as a result, HDM inmates are limited to daytime visits. This situation restricts the number of people who can come to see the inmates, since many potential visitors are working during the day.

Warden Rubin declared that night visits would serve a valuable administrative function. He suggested that visits could provide a much needed diversion in the evenings when there are no activities scheduled. The Board is in agreement with Warden Rubin's conclusion that many of the disruptive incidents which now occur most frequently during the idle evening hours could be avoided if there were night visits.

Program Services

An adequate selection of education courses and other program services would also help to fill idle hours and cut down on incidents.

According to Assistant Deputy Warden Roy Caldwood, Director of Programs, low school enrollment also is at least partially caused by the correction personnel shortage. On April 22, 1975, only thirty four inmates out of a total population of 1490 were attending the regular high school class and thirteen inmates were enrolled in the special class in which English is taught as a second language.

An enlargement of the small teaching staff would make the classes available to more inmates. Under the present system, inmates who arrive after a course has started must await its completion before they can enroll. An additional teacher would permit the school to run a second course to accommodate newly arriving inmates. According to Henry G. Hunter, Acting Principal of the Institutional Education Center, he is the only full time teacher on the staff; there is one assistant who works three days a week, and one "qualified" inmate whose educational experience includes one year of college.

Increased classroom space also would enable more inmates to attend, and would greatly enhance present conditions. One officer told the Board that although

the official capacity of the regular high school classroom is far beyond twenty, when that many inmates are seated, they are severely cramped; a situation hardly conducive to learning. Should a second full time teacher join the staff to teach an additional course, more space would become a necessity.

Besides the inadequate educational facilities and staffing, a further obstacle, according to ADW Caldwood, is the housing procedure for students necessitated by the lack of correction personnel. All students must be housed in one cellblock to facilitate pick-ups by the one officer assigned. Many inmates do not want to leave the familiar confines of their own cellblock. As a result, they often choose to sacrifice the educational opportunity to avoid readjusting to a new housing area.

Telephone Access

Finally, and perhaps most significantly in terms of the inmates' daily lives, personnel shortages and overcrowding have reduced already limited access to telephones.

The experience of other City facilities which provide inmates with wide access to phones is that the opportunity significantly reduces tension and frustration. Moreover, a statistical study by the Vera Institute of Justice has demonstrated that with all other factors held constant, inmates with access to telephones are twice as likely to

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"make" bail within a short period of their initial commitment than those for whom telephones are not available. At MDM there is only one phone in each cellblock, manned by a correction officer.

Previously, correction aides placed calls for the inmates, freeing an additional officer to aid in the supervision of the cellblock. Since the loss of 26 correction aide lines on January 16, as ADW Caldwood noted, the situation has become chaotic. Only 50-56 calls are now completed daily. Since the cellblocks ordinarily contain from 250 to 300 people, an inmate can still only place a call once every five or six days.

Warden Rubin indicated that a program to install three new telephones in each cellblock would be implemented in the near future. That alone would not solve all of the problems, however, since a correction officer would still have to be assigned to place the inmates' calls. The Warden suggested instead that the aid of the telephone company be enlisted in developing a system in which a token or coin-operated telephone could be utilized on the cellblocks, permitting inmates to make calls only within the New York City area. This procedure would free the officer from the task of dialing the number for each inmate to prevent him from calling long distance.

In fact, such a system does exist. According to Jack Meredith of New York Telephone Company, the Department's

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borough institutions have telephones with area code limitations; long distance calls are allowed within the tri-state area (area codes 516, 914, 203 and 201). A similar system is planned for Rikers Island but no target date has been set for its implementation. Mr. Meredith stated that until an extension is built onto Rikers Island Headquarters, the telephone company cannot provide the sophisticated technical equipment needed to install the area code limitation. As an alternative, Warden Rubin urged that CETA (Comprehensive Employment and Training Act) employees, now available to the City under an expanded Federal program, be used to maintain the four phones on each cellblock once they are in operation. The Board is in full agreement with Warden Rubin's suggestions.

The lack of telephone access is particularly aggravating at the HDM since inmates there have been receiving far fewer attorney visits than many of them did as Tombs prisoners. While the remoteness of Rikers Island is largely responsible for this lack of communication between lawyers and their clients, it would be incorrect and unfair to assert that the Department of Correction is responsible for the attenuation. However, in terms of the system's responsibility to facilitate fulfillment of defendants' Sixth Amendment rights, it seems reasonable to require that everything possible be done to facilitate

and even encourage attorney-client contacts. Improvement of the telephone system is a must in that regard.

III. Inappropriate Institutional Layout

The fact that HDM was transformed from a sentenced institution to a remand shelter over a three-day weekend underscores a paramount problem confronting HDM personnel: the facility was not originally intended or designed for the uses now required of it as a detention institution. On July 18, 1967, as a penitentiary for sentenced prisoners, HDM housed 2763 inmates. Although the census figure seems high in comparison with the current HDM figure, the inmate population was more manageable for several reasons.

First, the sentenced population was relatively stable with far less turnover among inmates than is now the case. Second, there was much less intra-institutional movement of inmates. For instance, inmates received one family visit every two weeks. Under present institutional policy, they are permitted two such visits weekly. In addition when HDM was a penitentiary, there were very few counsel visits, since the inmates had already been tried and convicted. Since the institution became a housing facility for detainees, the number of attorney visits has increased drastically, to as many as 44 in one business week (December 16-21, 1974).

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The majority of the penitentiary inmates were assigned to outdoor work gangs for most of each day. The location of a large segment of the population in one area facilitated supervision. Furthermore, the opportunity to leave the housing area and engage in outdoor activity served to reduce inmates' frustrations and anxieties. By contrast, detainees now are permitted one hour of gym time per week. The only other diversions are a weekly movie and television and radio broadcasts.

In 1967, while the facility was still a sentenced institution, there were five officers assigned to a cellblock. Since many if not most of the inmates were on work gangs, the officers were often required to supervise as few as 100 inmates within the cellblock during the day. This situation enabled the officers to provide more services for a much smaller number of inmates than is now the case.

Finally, there were more facilities to house the larger sentenced population. The then New York City Correctional Institution for Men contained two large dormitories that are no longer available for use by the MDM. One July 18, 1967, the penitentiary had a total single-cell housing capacity of 2843, compared to the present capacity of 1879.

Security Hazards

There is general agreement among the officers that given the present layout of the cellblocks, at least one

additional officer on each side is essential. If available, he could be posted at the mid-point of the block, with the assignment to supervise the rear three tiers.

The Department has proposed a plan, designated for Capital Budget purposes as the C-98 Program, which was submitted to the Bureau of the Budget on February 10, 1975 and which is almost identical to the officers' suggestions. Under these recommendations, the cellblocks would be divided into four quadrants, the second and third tiers of all cell blocks would be enclosed in wire mesh to prevent inmates from jumping, and two observation booths would be located strategically to give a full view of the blocks.

The cellblocks would be divided into 60-cell quadrants, and an officer would be added for each quadrant. This would permit a ratio of 60 inmates per officer. Department officials assert that under this plan, if the single-cell housing capacity is exceeded and the quadrant population rises to about 75 inmates, the ratio would still be within manageable proportions. In contrast at present, if each quadrant houses 75 inmates, one officer is required to supervise 150 inmates. For instance, on April 10, 1975, in three of the four general population cellblocks the single-housing capacity was exceeded, and one officer was responsible for as many as 140 inmates. Significantly, the day cited fell within a period in which

the City wide inmate population was considered by Departmental authorities to be at a low level. Should the population rise the HDM will be burdened not only with the increase in the number of Manhattan detainees, but also with the overflow from the other adult male detention facilities.

Additional recommendations by correction officers and superior officers for physical improvements in the cellblocks include: 1) reinforcing and increasing the height of the front gate to each cellblock to prevent inmates from vaulting or forcing it; 2) installing a catwalk to permit officers a safer and quicker method of patrolling the cellblock; and 3) installation of a passageway in the rear of the cellblock to avoid the necessity of coming all the way to the front of the cellblock to get to the other side. The Board is in agreement with these recommendations.

IV. Administrative Procedures at HDM

The activity in the HDM Receiving Room is, perhaps, the best illustration of the demands placed on the institution. Warden Thomas stated that almost 1000 inmates are processed daily. The HDM has been designated as the staging and transferring institution for all detainees to be transferred to and from the Ossining Correctional Facility ("OCF").* The strain

* Prior to the summer of 1973, the Correction law provided that the City and State could contract for additional

caused by the OCF transfers is especially onerous in view of the Department policy that all detainees sent to OCF from any City institution must first be processed through the HDM. A captain at the Receiving Room challenged the procedure, suggesting that it would be much more practical for each institution to process its own inmates. Although any alternative for reducing the strain on the HDM Receiving Room certainly appears desirable, the realities of budgetary problems suggest that a thorough cost-benefit analysis is in order. We urge such a study.

A similar procedure exists for transfers to Rikers Island Hospital ("RIH") which does not have its own Receiving Room, and must rely upon the HDM's facility. Therefore, all inmates coming from other City institutions must first be processed through HDM.* These procedures put an enormous burden on the area, particularly so because the institution originally had a very small Receiving Room. The present one is a makeshift facility,

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housing space for City sentenced prisoners to be housed in State institutions. During discussions of the then-proposed Dangerous Drug Law amendements, however, it was anticipated that the suggested long terms for drug sellers would result in high bails and cause massive increases in the number of pre-trial detainees housed in the City. In preparation for those expected increases, Section 79 of the Correction law was amended to empower the State and City to contract to house detainees upstate as well. Under the terms of that legislation, in the fall of 1973 the State and City contracted for the housing of pre-trial detainees at Sing Sing.

** An additional burden imposed upon the HDM staff - if not the institutional facilities - is the procedure for transferring inmates from RIH. If an inmate who was transferred to RIH from an off-island institution must then be sent to an off-island hospital, the HDM staff must provide two officers to transport the inmate.

built after the institution was designated as a detention institution, and is totally inadequate to cope with the turnover of inmates. Each morning the pens overflow with men scheduled to be shipped out. Those who cannot fit into the pens must be placed in the front of the Receiving Room, and in the shower area. As a result, newly admitted inmates who are processed later in the day must use showers that are littered with cigarette butts and other trash.

Moreover, the pens are sorely in need of repair. Toilet bowls are broken and window panes are knocked out, causing inmates to complain frequently about the cold and unsanitary conditions.

This situation could be improved dramatically by the renovation of present facilities and the construction of an extension on the unused yard which adjoins the Receiving Room. The Board is in full agreement with the Department's recommendations contained in the C-98 program calling for modernization of the Receiving Room "with respect to flow and function, improved lighting, windows and security of this facility."

The personnel shortage also causes problems in the operation of the Receiving Room. A principal example is the processing of inmates who must leave the HDM to go to court. During the period from 6:30 a.m. to 8:00 a.m. (one of the most active parts of the day), there are

only five correction officers on duty in the Receiving Room. This number is inadequate to handle the many inmates who leave for court each day (for example, on April 11, 1975, 242 inmates were taken from the HDM to court).

When the inmates come down from their housing areas, they must be directed to the appropriate holding pens. Because of the deficient facilities, one group must be placed in an open area in the front of the Receiving Room. When an inmate is missing, a Receiving Room Officer must be dispatched to his housing area, thus reducing further the already minimal staff. The result is a scene in which numerous inmates wander about, until they are shown their proper locations.

After the inmates destined for court are processed, at about 9:30-10:00 a.m., a new group is sent down from the housing areas. On April 11, 19 inmates who had to be transferred to other institutions, whether for special programs (i.e., methadone detoxification centers) or because they were sentenced, (detention transfers), were transported to the Correctional Institution for Men (CIFM). In addition, 51 inmates were transferred to the OCF, and 29 other inmates were returned from upstate institutions to the city.

From 9:00 a.m. to noon, eight officers are on duty in the Receiving Room. Of these eight, two must be deployed to pick up the inmates going to the methadone

detoxification center, and one must pick up the detention transferees. When medical problems arise, a fourth officer must be diverted from his regular duties to accompany an inmate to Rikers Island Hospital. Frequently, this officer's servcies are lost for two or three hours, because he must remain at the hospital until the inmate is ready to return.

There is always the risk that an additional officer must be dispatched to the housing areas to search for a missing inmate. Thus even though eight officers are assigned, as few as three or four may actually be on hand to manage the second mass of inmates departing from the institution. A Receiving Room captain commented that although on one day seven fights occured within a 40 minute period, the atmosphere was relatively calm given present conditions. He added that he was quite thankful, because he really did not have the personnel to deal with a major eruption.

The personnel shortage also affects the processing of incoming inmates. The inmates who go to court in the morning begin returning at about 11:00 a.m. On April 11, 29 inmates from OCF who were scheduled to make court appearances on that day were processed through the HDM Receiving Room. In addition there are new arrivals who have been remanded to the institution for the first time. All returning and newly arriving inmates must be searched

by two or at most three officers. The officers generally agree that under present conditions it is impossible to search thoroughly every person and maintain an appropriate pace.

Overcrowding in the Receiving Room also affects the quality of medical care that can be given there. All newly arriving inmates' must be examined by a physician. Although the vast majority arrive after 4:00 p.m., there is only one medical doctor on duty in the Receiving Room from 4:00 p.m. to midnight. As a result it is impossible to conduct a thorough examination of every inmate. The doctor's problems are compounded by the fact that he is located in the back of the Receiving Room, far from correction personnel. There simply is not enough staff to post an officer outside the doctor's office. In the event of problems, his only recourse is a button which triggers an alarm at the captain's desk. However, there would be a significant lapse of time before help could get from the front of the Receiving Room to the doctor's office.

The problems in the Receiving Room are not due to neglect by the officers or their superiors; they are due primarily to the lack of correction and medical

personnel needed to manage the enormous number of inmates processed daily through the HDM Receiving Room, the inadequate facilities which have to be used and the extra burdens placed on Receiving Room personnel by the duties they have to perform for other institutions.

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RECOMMENDATIONS

I. OVERCROWDING - The inmate population at HDM should not be allowed to exceed the available single-cell capacity of the institution. This can be accomplished by:

1. A Departmental order establishing a maximum population at a level not to exceed the available single-cell capacity of the institution

The Board is fully aware that if the pattern of the last several years holds true, summer will bring a rise in the total, systemwide detainee population. In that circumstance, a limit on HDM's population can only be sustained if all available space at other institutions is fully used. Certainly, present budget plans to close one and possibly two of the remaining borough houses of detention are unacceptable. To do so would not only force the continuance of dangerous overcrowding at HDM; it would ultimately mean a comparable situation at the other City prisons.

2. A reduction in present overpopulation through bail reevaluation.

A bail reevaluation program for the whole City prison system, and for HDM in particular should be considered

by the courts. Bail is set at a level the court determines is necessary to guarantee that the defendant will reappear in court for trial. The use of bail for preventive detention purposes is not a part of New York law, it has, in fact, been specifically rejected by the Legislature. On February 2, 1975, 3% of all the detainees at the HDM were being held for failure to post bail of $250 or less, 6% had bails of $251-500, and 10% were between $501-1,000.

Every detainee with bail of $1,000 or less should not be released. There are certain factors, however, that must be considered in a reevaluation: Inmates may now be able to post amounts that fall just short of the bail figure; or a bail reduction may bring the amount within the limits of one of several revolving cash funds operated by private or public agencies. In addition, a good deal more information about an inmate's background, employment history, family and community ties insuring his appearance in court for trial may be known by the time of a reevaluation than was available to the court when bail was first set.

The release of a substantial number of the inmates whose bail is set at $1,000 or less would have two primary results: It would decrease the overcrowding at HDM, and it would save the City a substantial amount by reducing the

daily costs of holding detainees for trial.*

II. PERSONNEL SHORTAGES - Additional custodial and civilian staff should be assigned to HDM to insure at least minimally adequate levels of supervision, safety and service. Recommended actions include:

1. Add 35 officers to the HDM staff by transfers from other institutions.

It is the opinion of the Board that this additional staff is needed to enable the institution to provide the most basic services. We are advised by Deputy Warden Gerard Brown that the 35 more officers could all be utilized at this time to fill the existing gaps in the institution's designated coverage. The openings in the various tours of duty resulting from the officers who call in sick, would require the assignment of additional officers to the institution beyond the 35. Only if these steps are taken could overtime for the institution be decreased substantially and the delays in sick call and medication and visiting procedures be reduced.

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* The latest available estimate is that it costs $42.69 per day to keep each inmate in the City prison system. One member of the Board, David Schulte, does not agree with this recommendation. His dissent is attached as Appendix A.

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In the final analysis, it is wiser economically to have a sufficient size staff at an institution, than to require officers to work overtime at a substantial extra cost to the City taxpayers. For instance, for the week of May 11, the officers worked 1,800 hours in overtime at HDM; for the week of May 25, they worked 1,480 extra hours. In view of these figures, it is apparent that if more officers were added to the HDM staff, a net savings to the City would result. Moreover, since the Department is losing 20-25 officers per month by attrition, overtime will be increasing steadily during the rest of the year.

2. Better utilize current staff resources by:

   A. Implementing a phone procedure whereby inmates will make their own calls, or civilian staff, CETA personnel or volunteers are used to place calls.

As mentioned previously, there are only four officers assigned to each of HDM's cellblocks, yet one must spend his time running the phone. Even if the population level is reduced to the available single-cell capacity and additional officers are assigned to the institution, this is a foolish and potentially dangerous use of officer manpower. The Board understands that the Department is presently training CETA personnel to work in the prisons. We recommend that these personnel, other civilian employees or, if

necessary, volunteers be used to man the phones until such time as an area code limitation system is operational. Work on the construction necessary to house that system should proceed on an emergency basis.

B. Revise Rikers Island Hospital and Ossining Correctional Facility transfer procedure so that the burden of transporting inmates is more evenly distributed among all the institutions.

The procedure for transferring inmates from Rikers Island Hospital (described on page 23) places a disproportionate burden upon the HDM staff. The fact that the HDM is also the staging and transferring area for all detainees being transferred to Ossining Correctional Facility places a further strain upon an already overburdened operation. The Board believes that alternatives to using the HDM Receiving Room for these purposes should be explored, in the meantime additional staffing should be provided.

C. Use new CETA personnel to perform clerical jobs now being done by officers.

Besides manning the telephones CETA personnel could perform clerical duties within the institutions, and thus free the officers to work in the cellblocks.

D. Have an extra technician to operate x-ray facilities at Rikers Island Hospital

At present the Rikers Island Hospital staff can administer x-rays to some inmates with minor injuries.

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The rest must be sent to Bellevue Hospital.

Depending upon the case, a minimum of two and sometimes three officers must accompany the patient. This procedure costs the Department $14.00 an hour per officer, or as much as $42.00 an hour. By contrast, an x-ray technician employed at Rikers Island Hospital would cost less than $5.00 an hour. The Board was advised that the number of inmates with minor injuries is sufficient to justify the hiring of a technician.

III. PHYSICAL FACILITIES - Physical deficiencies at the outmoded and overtaxed HDM facility must be rectified as rapidly as possible in order to provide greater protection to the correction officers and improve living and working conditions. While some of the recommended changes are expensive and will take some time, others can be accomplished more quickly and at minimal cost.

1. Renovate Cellblocks

   A. Dividing each side of a cellblock in two.

   B. Enclosing Second and Third tiers in wire mesh.

   C. Installing raised booths to observe all inmates congregating on the flats.

   D. Reinforcing and increasing height of front gate.

These recommendations are contained in the C-98 program for renovation and modernization of HDM submitted to the Bureau of the Budget by the Department of Correction.

According to these proposals, the cellblocks would be physically divided into four 60-foot quadrants, and an officer would be added for each quadrant. In addition, the second and third tiers of all cellblocks would be enclosed in wire mesh to prevent inmates from jumping, and two interview booths would be located strategically for full observation of the blocks.

E. Install catwalk.

Presently, the unarmed officer is on duty within the confines of the cellblock with as many as 150 inmates. The installation of a catwalk would permit officers a safer and quicker method of patrolling the cellblock.

F. Install Passageway to connect cellblocks in the rear.

If an officer on one side of a cellblock is needed on the other side due to an emergency, he must come all the way to the front to get to the other side. The installation of a rear passageway would avoid this necessity.

G. Install inclined ledges so as to prevent slow-burning material from being lodged next to the windows.

Warden Rubin informed the Board that since inmates discovered that the newly installed windows at MDM are flammable, several attempts have been made to set fire to

them. In two instances, the inmates were successful. In one of these cases, inmates actually escaped from the building in this way. In order to prevent inmates from throwing flammable material and having it come to rest on the window ledge, Warden Rubin suggests a 45° inclined piece of metal be installed on the ledge. The Board agrees with his suggestion.

H. All-night sound system.

At present, cellblock 2 is the one which receives all incoming inmates. An all night sound system is employed to direct the new inmates to their proper cells. Unfortunately, the special observation unit for emotionally disturbed inmates is located in Block 2. Loudspeaker messages transmitted intermittently throughout the night can be disconcerting to any person who is trying to sleep; to a maladjusted individual it may be provocative. The Board recommends that no messages be transmitted over the loudspeaker after the institutional radio is turned off at 11:00 P.M.

2. Renovate Receiving Room

A. Repair damaged facilities.

All those concerned with the institutional operation will acknowledge the deteriorated conditions in the Receiving Room. Minimal sanitary and security considerations require that the broken toilet bowls and windows be repaired.

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B. Construct extension in unused yard.

An extension to the Receiving Room would enable the staff to direct the inmates to clearly delineated waiting areas. The present chaotic atmosphere would be reduced since inmates would not have to be placed in the front of the Receiving Room (where there is no physical structures to prevent the inmates from roaming throughout the room) or the shower area. The yard in which the extension would be constructed is not being used.

IV. COURT REQUIREMENTS - Federal court mandated changes in visiting procedures, classification, and the provision of outdoor recreation should be implemented on schedule.

On April 23, 1975, United States District Judge Morris Lasker entered an amended judgment in the "Tombs" case, Rhem v. Malcolm, mandating a number of changes in the conditions under which inmates are held at MDM. These include: (1) a classification system; (2) the right of inmates to leave their cells i.e., be locked-out for longer periods of time; (3) an optional lock-in program for those who prefer to remain in their cells; (4) contact visits; (5) night or weekend visits; (6) outdoor exercise for at least an hour a day on weekdays; (7) observance of an earlier order regarding disciplinary proceedings and correspondence.

The timetables for implementing these changes have not, in all cases, been followed particularly with regard to visiting rights and recreation. The Board believes that any further delay is not only unwise given the conditions at HDM, but also may well put the City in the position of being in contempt of Judge Lasker's order.

V. STATE FUNDING - State funds should be sought to reimburse the City for the cost of housing the thousands of detainees awaiting trial in State courts, including those at HDM.

As of June 6, 1975, a total of 3,726 inmates were being detained by New York City pending disposition of their cases in State Supreme Court or awaiting transportation to State facilities. One thousand seventy-eight of these inmates were housed at HDM. It is illogical and unfair that the City should have to bear the entire financial burden of holding those inmates. In fact, a strong case can be made for the proposition that the State should bear the entire cost of the New York City system. In its recent report and recommendations on Criminal Justice, the State Charter Revision Commission suggested a total State takeover of funding for the City's correctional institutions. Without taking a position on that recommendation, the Board does believe that at a minimum, the City should be reimbursed by the State for the costs of inmates being held for processing in the State court system or awaiting transportation to State facilities to serve their sentences.

APPENDIX A

MR. SCHULTE'S DISSENT FROM THE RECOMMENDATION THAT THE COURTS REEVALUATE BAIL SETS AT LESS THAN $1,000

The release of a substantial number of inmates to the streets of New York City as proposed here might easily have a third result not mentioned in this report; the endangerment of the law abiding citizen of New York City.

It is my opinion that the majority report of the Board of Correction in this regard is without merit. There exists the probability that the vast majority of such inmates held awaiting trial were deemed by the committing judge to be a danger to the community or a threat to the functioning of the Criminal Justice System.

No thorough study has been brought to the Board's attention detailing the offenses for which these inmates were held. What is accepted by most authorities as accurate is the rule of thumb that 2/3 or 3/4 of those arrested and in detention awaiting trial are possessors of previous arrest and/or conviction records. They have previously been accused of being a threat to the safety of the community and the tranquility of the citizen in his right to the pursuit of happiness in this society.

The Criminal Justice System at the present time is not equipped to offer a reasonable assurance to the community

that pre-trial parole or other forms of court approved supervision in the community will remove the threat of renewed acts of violence against the citizenry by such inmates. Despite claims to the contrary, no satisfactory proof to document such claims has been presented to me. Furthermore, offenders who have already jumped bail exist in such numbers as to spread fear, justified or not, throughout the community.

Finally, fear of crime, street crime, the violent crime of robbery, mugging, rape, assault, murder as well as fear of the silent crime of burglary and larceny has already emptied the streets of many sections of this City after sundown. It has reduced the quality of life in this City for all people. To quote Roy Wilkins:

> "It is time for some plain-talking about crime among our fellow Americans of all races. The unvarnished facts are: In urban areas most of the victims of street crimes are Blacks and other minorities."

A New York Times January 16, 1974 survey states,

> "an overwhelming majority of New Yorkers (63%), rich and poor, black and white, conservative and liberal -- regard crime as the worst problem they face personally and the single issue that they would most like Mayor Beame's new administration to tackle."

To relax the protective features of the Criminal [illegible] system at this point in time is counterproductive.

It is a disservice to the accused who may be in deep trouble with himself and in need of treatment. It is an increased threat to the safety of the citizen to whom the Criminal Justice System owes protection.

The basic purpose of the Correctional System is to protect the public and secondly to treat the accused and rehabilitate, if possible, the offender. To attempt to reverse this priority flies in the face of common sense.

The Board of Correction's majority report relative to the subjects discussed above is not dedicated to these ends and therefore, in my judgment, is not in the public interest.

Defendants' affidavit in opposition

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES BENJAMIN, MIGUEL GARCIA, BRUCE HAYES, JOSE SALDANA and ROBERT ESCHERT, detainees of the New York City House of Detention for Men, individually and on behalf of all other persons similarly situated,

Plaintiffs,

-against-

BENJAMIN J. MALCOLM, Commissioner of Correction of the City of New York; ARTHUR RUBIN, Warden, New York City House of Detention for Men; GERARD BROWN, Deputy Warden, New York City House of Detention for Men; and ABRAHAM D. BEAME, Mayor of the City of New York, individually and in their official capacities,

Defendants.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

BENJAMIN J. MALCOLM being duly sworn, deposes and says that:

1. He is Commissioner, New York City Department of Correction. This affidavit is submitted in opposition to the plaintiff's motion in a preliminary injunction.

2. Upon this Department's closing of the Manhattan House of Detention for Men (The Tombs) the plaintiffs, in the matter of Phem v. Malcolm moved that this Court order that the transferees from the Tombs be afforded treatment and conditions upon their transfer consistent with the Court's opinion.

3. As a result of this motion, the Court held a hearing wherein it examined conditions and practices at the New York City House of Detention for Men (hereinafter referred to as HDM), the principal institution designated to receive Tombs transferees.

4. After considering the evidence, this Court determined that consistent with the conclusions of law set forth in the Rhem decision, inmates transferred to HDM should be afforded specified treatment in the area of personal visitation and recreation. In addition, the Court ordered the defendants to experimentally afford an altered optional lock in program to selected inmates, and, also included in its judgment provisions relating to correspondence and disciplinary practices. The Court rejected plaintiffs' claims that the Tombs transferees were, upon their placement in HDM, confined for periods of time that were excessively restrictive or not otherwise justified.

5. The defendants wish to apprise this Court that they are in compliance with the terms of the April 23, 1975 judgment. At the present time, inmates falling within the class delineated by the Rhem lawsuit presently receive outdoor recreation each week day (weather permitting). Moreover, such inmates receive personal visits on four week days every Sunday, and, in cases where they have minor children, on Monday nights. Contact visits will be afforded to appropriate class members in conformity with the judgment of the Court. With respect to the Court's requirement that de-

fendants study the feasibility of affording optional lock in to the Phem detainees during the week day morning and afternoon lock out periods, the institutional staff has placed all detainees falling within this class (30-40 out of approximately 1600 detainees) into one housing block and thus permit these detainees to enter and leave their cells during all lock out periods. Finally, all portions of this Court's April 23, 1975 judgment concerning correspondence and discipline are being applied to members of the Phem class.

6. The Court should note that this department is making every effort to apply the Phem judgment to all HDM 1600 (approx.) inmates. For instance, with respect to personal visitation, inmates at HDM shall receive visits on four week-days, in addition to one visit on either a Saturday or Sunday (fully consistent with this Court's judgment). The department is presently in the process of constructing for use by non-class members a contact visitation facility. Similarly, the summer phase of the institution's recreation program closely approximates the recreation provisions set forth in this Court's judgment. Presently, each detainee is afforded four ninety minute periods.

7. With respect to the optional lock in provisions of the judgment, it is the opinion of the members of the department that the imposition of the optional lock in program during the week-day morning and afternoon lock out periods would seriously interfere with the proper and orderly administration of the institution. As this Court is aware, inmates at HDM are provided with a wide

variety of services and programs. During the aforementioned hours, inmates must be assembled and escorted to the clinic, hospital, counseling area, attorney room, visitation area, as well as to the various program areas. In order to insure that the inmates expeditiously receive the servies as outlined above, it is essential that the correction officers stationed in the housing blocks not be required to locate and lock out individual detainees every time one of the several hundred detainees on a housing block is scheduled to receive a particular service, or is visited by an attorney or personal visitor. It must be noted that optional lock in at MDM has already been expanded considerably. At the time of the Tombs trial, that institution did not afford its inmates the option of returning to their cells during lock out periods. At MDM, inmates may return to their cells during all lock out periods, except during the week day morning and afternoon periods when the aforementioned programs and services are in full operation.

8. Regarding the allegations concerning disciplinary procedures, the MDM administration has adopted and presently utilizes for all detainees disciplinary procedures consistent with this Court's order in the matter of Rhem v. Malcolm (excepting those portions covered by the Court's stay). And, regarding correspondence rules and regulations, the Court should note that the MDM administrators apply, for the entire detainee population, procedures consistent with paragraphs 1 and 2 of the Rhem order of March 19, 1974.

Defendant's Affidavit.

9. In considering this motion for a preliminary injunction, this Court must note then that the conditions and practices afforded to members of the Rhem class largely resemble the conditions afforded to HDM inmates as a whole. The only differences in treatment afforded to members of the Rhem class are the following:

a. Members of the Rhem class presently receive 5 periods of outdoor recreation whereas the rest of the institution receives 4 such periods. These periods are 90 minutes in length, except that the additional period received by Rhem class members is one hour in length.

b. Optional lock in during weekday morning and evening lock out periods has not been extended to non-class members.

c. Contact visits for the Rhem class of inmates will commence on or before the date established in the April 23, 1975 judgment. Contact visits for the rest of HDM population must await the completion of the required construction.

d. The publishers only rule is presently applied to the non-class members.

10. It is submitted that in the area of contact visitation, it is clearly reasonable to await construction of the proper facility before large numbers of inmates can be afforded this privilege. And, in the areas of recreation and optional lock in practices, it is urged that

such issues are not properly the subject of preliminary relief. For, while the Court, at the relief hearing, heard evidence concerning differences between the Tombs and HDM, the instant plenary lawsuit will enable both sides to assemble a complete record with respect to such issues. Since the disposition of such issues can undoubtedly have major operational and budgetary upset on this department, as well as on the City of New York, the Court should not consider requiring the department to undertake the substantial expenditures involved, or award what amounts to final relief, before a complete record has been made and all relevant evidence considered.

WHEREFORE, the motion should be denied.

BENJAMIN J. MALCOLM

Sworn to before me this
day of July, 1975.

Order Granting Preliminary Injunction.

PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

JAMES BENJAMIN, MIGUEL CALINDEZ, BRUCE HAYES, JOSE SALDANA and ROBERT ESCOBET, detainees of the New York City House of Detention for Men, individually and on behalf of all other persons similarly situated,

Plaintiffs,

-against-

BENJAMIN J. MALCOLM, Commissioner of Correction of the City of New York; ARTHUR RUBIN, Warden, New York City House of Detention for Men; GERARD BROWN, Deputy Warden, New York City House of Detention for Men; and ABRAHAM D. BEAME, Mayor of the City of New York, individually and in their official capacities,

Defendants.

75 CIV. 3073 MEI

ORDER

- x

The plaintiff class, consisting of all pre-trial detainees who are or will be incarcerated at the New York City House of Detention for Men on Rikers Island (HDM), having moved this Court for a preliminary injunction on the issues of outdoor exercise, visiting schedule, contact visits, the right to remain in one's cell during lock-out periods, and procedures regarding correspondence and discipline; and plaintiffs having further moved this Court for an order enjoining defendants from soliciting a waiver from any member of the plaintiff class of the rights accorded

to him under said preliminary injunction; and the Court having considered the affidavits, exhibits and memoranda submitted by both sides, and having heard oral presentations by counsel for both sides; and upon consideration of the record of the relief hearing and other proceedings conducted before it on MDM in the matter of Ehem v. Malcolm (70 Civ. 3962); and the Court, having issued an opinion dated July 11, 1975 constituting its findings of fact and conclusions of law; it is hereby

ORDERED that defendants, their agents and employees and all persons acting in concert with them be and hereby are enjoined from incarcerating any member of the plaintiff class at MDM except under the following conditions:

1. Contact Visits

(a) Commencing July 23, 1975, the defendants shall forthwith take all pratical steps necessary to ~~afford contact~~ provide facilities for all class members, and all personal visits to class visits to ~~MDM detainees~~. members shall be contact visits as soon as such facilities have been provided

(b) Defendants, upon establishing a classification system, may deny contact visits to selected detainees in instances where defendants can establish, based upon said classification system, that contact visits would jeopardize institutional security.

2. Optional Lock-in in accordance with judgment

Upon entry of this judgment, defendants shall commence a program of optional lock-in as set forth in the judgment of this Court, dated April 23, 1975. The program shall be carried out as follows:

Order.

(a) Within sixty days of the date of entry of this judgment, defendants shall commence a program of optional lock-in during activity periods in two cell blocks chosen by the Warden of the House of Detention for Men at Pikers Island. Inmates in such cell blocks choosing to remain locked in their cells during activity periods shall have the option to do so.

(b) In the event that upon the expiration of thirty days after the commencement of such expanded optional lock-in the Warden of the House of Detention for Men at Pikers Island determines that it is not practical or feasible to extend such optional lock-in to all the members of the plaintiff class, he shall report to the court in writing his reasons for such a conclusion, furnishing a copy of such report to the attorneys for the plaintiffs. Within ten days thereafter counsel for the plaintiffs shall respond in writing to the court furnishing a copy of their response to attorneys for the defendants. Thereafter, the court will determine whether the program of expenaded optional lock-in shall be eliminated, further tested or applied to all members of the class within the institution.

(c) Unless the Warden of the House of Detention for Men at Pikers Island shall timely furnish the court with the report referred to in the previous paragraph, then upon the expiration of the sixtieth day after the commence-

ment of such expanded optional lock-in, all members of the plaintiff class shall be entitled to and receive such expanded optional lock-in.

(d) At the option of the defendant, Commissioner of Corrections for the City of New York, may commence the expanded optional lock-out program specified in sub-paragraph (a) above simultaneously in all cell blocks of the House of Detention for Men. Whether the Commissioner exercises the option provided in this sub-paragraph (d) or not, the procedures specified in sub-paragraphs (b) and (c) above shall be followed.

3. Correspondence

(a) Defendants shall not read any incoming mail addressed to plaintiffs from any court, attorney or public official, or any employee thereof acting in an official capacity;

(b) Defendants shall not open any incoming mail addressed to plaintiffs from any court, attorney or public official, or any employee thereof acting in an official capacity, except in the presence of the addressee;

4. Discipline

The provisions of Paragraphs 4 and 5 and Schedule A of this court's judgment of March 22, 1974 in the matter of Rhem v. Malcolm shall be observed by defendants with respect to all members of the plaintiff class except to the extent stayed by this court's order of July 31, 1974 in the aforesaid matter, And it is further

Order.

ORDERED that plaintiffs' motion for preliminary relief on the issues of outdoor exercise and visiting schedules be and hereby is denied, upon the representation of defendant Malcolm that each detainee at HDM is presently being accorded four ninety minutes periods of outdoor exercise per week ~~during the warm-weather season~~, and four thirty-minute week-day visiting periods per week and that commencing July 12, 1975, each detainee at HDM will in addition be accorded one thirty-minute visit each week-end; and it is further

ORDERED, that the record in the plaintiffs' motion for preliminary relief enjoining the defendants from refusing to deliver to plaintiffs any book, periodical or other reading matter not sent directly from the publisher is hereby denied, in ~~that the record in neither~~ the Rhem v. Malcolm ~~relief hearing nor~~ the ~~record in the instant~~ matter included ~~evidence as to the adequacy of inadequacy of HDM's library facilities, and it is further~~

ORDERED that plaintiffs' motion for an order enjoining defendants from soliciting a waiver from any member of the plaintiff class of the rights accorded him under this order be and hereby is denied; and it is further

ORDERED that this order is hereby stayed for a period of ten days from its filing to permit the defendants to file a notice of appeal to the United States Court of Appeals for the Second Circuit; and it is further

Order.

ORDERED that upon the serving and filing of the notice of appeal, this order is hereby stayed in all respects until the date upon which the defendants' appeal is orally argued before the Court of Appeals.

Dated: New York, New York
July 11, 1974

U. S. D. J.

Defendants' notice of appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

JAMES BENJAMIN, MIGUEL GALINDEZ, BRUCE HAYES, JOSE SALDANA and ROBERT ESCH T, detainees of the New York City House of Detention for Men, individually and on behalf of all other persons similarly situated,

Plaintiffs,

-against-

BENJAMIN J. MALCOLM, Commissioner of Correction of the City of New York; ARTHUR RUBIN, Warden, New York City House of Detention for Men; GERARD BROWN, Deputy Warden, New York City House of Detention for Men; and ABRAHAM D. BEAME, Mayor of the City of New York, individually and in their official capacities,

Defendants.

----------x

75 Civ. 3073 MEL

NOTICE OF APPEAL

S I R S :

NOTICE is hereby given that the defendants hereby appeal to the United States Court of Appeals for the Second Circuit from the order entered herein on July 11, 1975

Defendant's Notice of Appeal.

which granted plaintiffs a preliminary injunction.

DAted: New York, N.Y.

July 15, 1975

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Defendants
Office & P.O. Address:
Municipal Building
New York, N.Y. 10007

By_____
CARL SANDERS

TO: LEGAL AID SOCIETY
PRISONER'S RIGHTS PROJECT
15 Park Row
New York, N.Y. 10007

Att: Joel Berger, Esq.

Memorandum of July 11, 1975.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civ. 3073

MEMORANDUM

JAMES BENJAMIN, MIGUEL GALINDEZ, BRUCE HAYES, JOSE SALDANA and ROBERT ESCHERT, detainees of the New York City House of Detention for Men, individually and on behalf of all other persons similarly situated,

Plaintiffs,

—against—

BENJAMIN J. MALCOLM, Commissioner of Correction of the City of New York; ARTHUR RUBIN, Warden, New York City House of Detention for Men; GERARD BROWN, Deputy Warden, New York City House of Detention for Men; and ABRAHAM D. BEAME, Mayor of the City of New York, individually and in their official capacities,

Defendants.

APPEARANCES:

THE LEGAL AID SOCIETY
15 Park Row
New York, New York 10038
Attorneys for Plaintiffs
Of Counsel: WILLIAM E. HELLERSTEIN, ESQ.
JOEL BERGER, ESQ.
STEVEN A. HERMAN, ESQ.

W. BERNARD RICHLAND, ESQ.
Corporation Counsel
Municipal Building
New York, New York 10007
Attorney for Defendants
Of Counsel: DONALD TOBIAS, ESQ.
Assistant Corporation Counsel

Memorandum of July 11, 1975.

LASKER, D.J.

In this class action brought by pre-trial detainees at the New York City House of Detention for Men (HDM) plaintiffs move for a preliminary injunction restraining the defendants from incarcerating any detainee at HDM without affording him (a) an hour of outdoor exercise each week day; (b) a minimum of four 30 minute visits weekly, at least one of which shall be at night or on a weekend; (c) contact visits between detainees and their visitors; (d) the option to remain in his cell during "lock-out" periods; and (e) certain rights regarding disciplinary procedures and correspondence as set forth in the judgments of this court in *Rhem* v. *Malcolm,* (70 Civ. 3962) dated March 22, 1974 and April 23, 1975. In addition, plaintiffs request an order enjoining defendants from soliciting from any detainee at HDM a waiver of the rights accorded to him under the *Rhem* judgments.

Finally, the plaintiffs move for an order declaring the case to be a class action and permitting them to proceed without prepayment of fees or costs pursuant to 28 U.S.C. § 1915.

I.

As reference to the court's earlier judgments suggests, this case arises in the wake of the earlier litigation in *Rhem* v. *Malcolm,* a class action on behalf of persons

housed in the Manhattan House of Detention, generally known as the Tombs. See 371 F.Supp. 594 (S.D.N.Y. 1974), *aff'd in part and remanded in part,* 507 F.2d 333 (2d Cir. 1974). In that suit the court found that conditions at the Tombs deprived the inmates of their constitutional rights. The *Rhem* judgment of March 22, 1974 contained specific provisions as to inmate discipline and correspondence, and in addition ordered the defendants (who in that case as in the present one included the Commissioner of Correction of the City of New York, the Mayor of the City of New York and the Warden and Deputy Wardens of the institutions in question) to submit a comprehensive and detailed plan for the establishment of a classification system, inauguration of contact visits, improvement of the visiting schedule, increased recreational opportunities and optional lock-in. These requirements were reimposed by the court's further judgment of July 11, 1974.* On appeal by the defendants, the *Rhem* judgments were affirmed insofar as based on findings of fact and conclusions of law as to conditions at the Tombs, and remanded for consideration of the remaining relief to be granted. 507 F.2d 333.

Following the decision of the Court of Appeals, the defendants closed the Tombs and transferred its inmates (the plaintiffs in the *Rhem* action) to HDM. The *Rhem*

* 377 F.Supp. 995 (1974).

plaintiffs then contended that under the judgments as affirmed they were entitled to the same benefits they would have enjoyed had they not been transferred from the Tombs. Accordingly, the court in *Rhem* visited HDM, took testimony to determine the matter, and rendered a written opinion. *Rhem* v. *Malcolm,* 389 F.Supp. 964 (S.D.N.Y. 1975). On April 23, 1975 the court entered an amended judgment providing that the plaintiffs in *Rhem* who had been transferred to HDM were constitutionally entitled to (1) one hour of outdoor exercise each week day; (2) four 30 minute visits weekly, including at least one at night or on a weekend; (3) contact visits; (4) the option of remaining in the cell during lock-out periods and (5) specified procedures governing discipline and correspondence.

The *Rhem* judgment of April 23, 1975 applied only to detainees at HDM who had been transferred there from the Tombs, and the City authorities have applied it only to those detainees, who now number only 15 or 20 of the 1500 detainees presently held at HDM.

II.

The instant litigation is brought on behalf of all present or future detainees at HDM, attacking the constitutionality of the conditions in which they are held in custody. The present motion seeks to extend forthwith to all HDM detainees the rights to which the *Rhem* court held by its

earlier judgments that former Tombs inmates transferred to HDM were entitled.

The defendants oppose the application for preliminary relief on various grounds but rest primarily on their contention that to grant the injunction would amount to an unjustifiable grant of final relief at the outset of the litigation. Ordinarily such an argument would carry great weight, but in view of the historical background this is not an ordinary case. The plaintiffs point out that the record in *Rhem* v. *Malcolm,* including the affirmance by the Court of Appeals, establishes an overwhelming likelihood of success on the merits in the present case, and that any delay in according plaintiffs their constitutional rights would be unjust. They argue that the need for immediate relief is underscored by the finding of the New York City Board of Correction in its report on HDM of June, 1975 that:

> ". . . the situation is critical and deteriorating. It is, in our judgment, the most serious and potentially explosive prison atmosphere to exist in New York City in recent years. If potentially tragic problems are to be avoided, changes should be implemented before the expected summer upsurge in arrests and tensions multiply existing difficulties.
>
> * * *
>
> To defuse this tense and dangerous situation, a number of immediate and longer-range steps should be undertaken. We are convinced that decisive action,

> taken now, can turn the situation around and break the mutually-reinforcing chain of events that is currently sweeping HDM toward a major crisis. Paramount among the actions the Board recommends are:
> ...
> 3. Federal court-mandated changes in visiting procedures, classification, and the provision of outdoor recreation should be implemented on schedule."

III.

Before reaching a determination of the issues disputed on the motion, we note that the defendants have represented to the court that they are presently complying or substantially complying with the requirements of the *Rhem* judgments as to visiting schedules, exercise privileges, and discipline. Accordingly, we put those issues aside.

* * * *

A party moving for a preliminary injunction must establish either a "combination of probable success and the possiblity of irreparable injury or that [it has] raised serious questions going to the merits and that the balance of hardships [tips] sharply in [its] favor." *Pride* v. *Community School Board,* 488 F.2d 321, 324 (2d Cir. 1973).

We agree with plaintiffs that by virtue of the *Rhem* record, which includes evidence as to conditions at HDM itself, the plaintiffs have established the overwhelming

probability that they will succeed on the merits as to the issues of contact visits and optional lock-in. Indeed, it is difficult to conceive what facts defendants can prove in this litigation as to these issues which they have not already placed on the record (or had the opportunity to establish) in *Rhem.*

Nor is there doubt that the plaintiffs have met the burden of establishing "the possibility of irreparable injury" as to contact visits and optional lock-in. The continuing daily deprivation of constitutional rights to minimal physical conditions of custody and the right to a contact visit with a family member or friend (*Rhem* v. *Malcolm, supra,* 507 F.2d at 339) is irreparable by definition.

Defendants argue in their memorandum of July 10, 1975 that no injunction relating to lock-in should be granted because to do so would require "definitive expenditures and changes prior to a full scale determination on this issue." As we have noted, such an argument would ordinarily carry great weight but this is, in view of its historical background, an extraordinary case. In *Rhem,* this court conducted evidentiary hearings as to lock-in conditions at HDM itself. The court heard the testimony of the Warden of HDM, who specified in detail the facts which the defendants claimed to support their position that the hours of optional lock-in should not be expanded. Neither

defendants' affidavit nor their memorandum in opposition to the current motion make any offer of further proof on the subject. In any event the decree to be granted on this motion will not in any way exceed the parameters of the judgments rendered in *Rhem* on the basis of the evidentiary hearings.

Moreover, the granting of an injunction at this time is not, as suggested in defendants' memorandum (p. 9), inconsistent with the order of June 26, 1975, denying the *Rhem* plaintiffs' request to reopen the proceedings in that case. We noted at that time that plaintiffs sought to raise "extensive questions of law and fact which should not be raised in a case . . . [in] which a final judgment has been filed," and that because such questions might "relate to conditions at institutions other than HDM, they should be litigated in a plenary lawsuit . . ." The present case is indeed a new plenary lawsuit, but it involves only HDM, an institution whose conditions have already been extensively explored by the parties and the court. We are not required by any rule of law or common sense to shut our eyes to what is a matter of record and known to the court and all the parties.

We view differently the remaining issue, that is, the right of all HDM inmates to receive magazines and

books not originating with the publisher, as ordered in *Rhem*. As to that question, defendants properly point out that neither the *Rhem* record nor the record in this case includes evidence as to the adequacy or inadequacy of HDM's library facilities. They persuasively argue that they should not be preliminarily enjoined from invoking the rule that inmates may receive magazines and books only from the publishers directly, a rule which they claim contributes to the security of the institution, without plaintiffs' showing that HDM's library facilities are insufficient to remedy such a limitation.

Accordingly, the defendants are enjoined from incarcerating any detainee at the New York City House of Detention for Men without affording him (a) contact visits and (b) the option of remaning in his cell during lockout periods in accordance with the judgment of April 23, 1975 in *Rhem* v. *Malcolm*.

The motion to declare case a class action pursuant to Federal Rules of Civil Procedure 23(c)(1) and Rule 11A of the Civil Rules of this court, which is unopposed by the defendants, is granted. The allegations of the complaint clearly comply with the requirements of Rule 23, Federal Rules of Civil Procedure. Indeed, it has become the norm that cases challenging the constitutionality of the conditions of custody of prisoners are brought and allowed as class actions.

Memorandum.

The motion to enjoin the defendants from soliciting waivers from members of the plaintiff class in *Rhem* is denied, both because the defendants represent that no such solicitations are being made and because the subject matter does not and would not appropriately fall in the purview of the complaint in this separate action.

The motion to permit plaintiffs to proceed without payment of fees or costs or security pursuant to 28 U.S.C. § 1915 is granted.

Submit order on notice.

Dated: New York, New York
July 11, 1975.

MORRIS E. LASKER
U.S.D.J.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

BRUCE GARNER

being duly sworn, says that on the 9 day of SEPT., 1975

at No. 15 PARK ROW in the Borough of MAN'H. in New York City, he served 3 copies

of the annexed JOINT APPENDIX upon THE LEGAL AID SOCIETY Esq.,

the Attorney for the PLTFF - APPLEE, in the within entitled action, by delivering

a copy of the same to a person in charge of said Attorney's office, and leaving the same with him.

Sworn to before me, this 9
day of SEPT., 1975

MIRIAM MULBERG
Commissioner of Deeds
City of New York - No. 3-1669
Commission Expires July 1, 1977

Bruce Garner

Form 320-3M-123057(61) 114

Miriam Mulberg